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No. 93-

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

THE ANSCHUTZ CORPORATION,
Petitioner,

v.

AMOCO ROCMOUNT COMPANY, *et al.*,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the Tenth Circuit err in concluding, contrary to recent decisions in several other Circuits with which the Tenth Circuit expressly disagreed, that a corporation's "principal place of business" under 28 U.S.C. § 1332(c) should be determined on the basis of its "total activity" rather than on the basis of its more definite and more easily determined "nerve center," even when the corporation's physical operations are distributed among several states in unknown proportions?

2. Did the Tenth Circuit err in refusing to determine, in a $29 million diversity case, in which state one of the parties had its principal place of business where (1) the selection of one state would have destroyed diversity and (2) the controlling statute specifically requires a determination of "the" state in which the company has its principal place of business?

PARTIES TO THE PROCEEDINGS

Petitioner The Anschutz Corporation was defendant-appellant below. Respondents Amoco Rocmount Company and Champlin Petroleum Company were both plaintiffs-appellees. Respondents Jerry D. Armstrong, J.H. Bander, Ray O. Brownlie, James B. Wallace, BWAB, Inc., Chevron U.S.A., Inc., Mesa Petroleum Company, MTS Limited Partnership, Mobil Rocky Mountain, Inc., and Pan Canadian Petroleum, Inc. were all third party defendants in The Anschutz Corporation's counterclaim against Amoco Rocmount Company and Champlin Petroleum Company and were appellees below.

Pursuant to S. Ct. Rule 29.1, petitioner notes that the following are non-wholly owned subsidiaries of The Anschutz Corporation: Southern Pacific Rail Corporation, Southern Pacific Telecommunications Company, and TAC Property Management.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDINGS	ii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	2
PERTINENT STATUTORY PROVISION	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT	6
1. The Statute and Its History	6
2. The Split in the Circuits	13
3. The Issue Is One Deserving Review	20
CONCLUSION	24
APPENDICES	
Appendix A:	
Opinion of the Court of Appeals	1a
Appendix B:	
District Court Findings of Fact and Conclusions of Law	30a
Appendix C:	
Order of the Court of Appeals Denying Petition for Rehearing and Suggestion for Rehearing En Banc	55a

TABLE OF CONTENTS—Continued

Page

Appendix D:

Judgment of the Court of Appeals 58a

Appendix E:

Judgment of the District Court 60a

TABLE OF AUTHORITIES

CASES Page

Anniston Soil Pipe Co. v. *Central Foundry Co.*, 216 F. Supp. 473 (N.D. Ala. 1963), *aff'd*, 329 F.2d 313 (5th Cir. 1964) 17

Arbee Mechanical Contractors, Inc. v. *Capital Sun Corp.*, 683 F. Supp. 144 (E.D. Va. 1988) 16

Associated Petroleum Producers, Inc. v. *Treco 3 Rivers Energy Corp.*, 692 F. Supp. 1070 (E.D. Mo. 1988) 18

Buethe v. *Britt Airlines, Inc.*, 787 F.2d 1194 (7th Cir. 1986) 18

Carolina Carbon and Stainless Products, Inc. v. *IPSCO Corp.*, 635 F. Supp. 305 (W.D.N.C. 1986) 17

Danjaq, S.A. v. *Pathe Communications Corp.*, 979 F.2d 772 (9th Cir. 1992) 18

deWalker v. *Pueblo Int'l, Inc.*, 569 F.2d 1169 (1st Cir. 1978) 14-15

Egan v. *American Airlines, Inc.*, 324 F.2d 565 (2d Cir. 1963) 12, 15

Gafford v. *General Elec. Co.*, 997 F.2d 150 (6th Cir. 1993) 8, 18

Grinter v. *Petroleum Operation Support Serv., Inc.*, 846 F.2d 1006 (5th Cir. 1988) 17

Harris v. *Black Clawson Co.*, 961 F.2d 547 (5th Cir. 1992) 17

Industrial Tectonics, Inc. v. *Aero Alloy*, 912 F.2d 1090 (9th Cir. 1990) 19

Inland Rubber Corp. v. *Triple A Tire Serv., Inc.*, 220 F. Supp. 490 (S.D.N.Y. 1963) 14-15

J.A. Olson Co. v. *City of Winona*, 818 F.2d 401 (5th Cir. 1987) ..... *passim*

Kanzelberger v. *Kanzelberger*, 782 F.2d 774 (7th Cir. 1986) 18

Kelly v. *United States Steel Corp.*, 284 F.2d 850 (3d Cir. 1960) 13, 16

Masterson-Cook v. *Criss Bros. Iron Works, Inc.*, 722 F. Supp. 810 (D.D.C. 1989) 19

Media Duplication Servs., Ltd. v. *HDG Software, Inc.*, 928 F.2d 1228 (1st Cir. 1991) 11

TABLE OF AUTHORITIES—Continued

Page

Metropolitan Life Ins. Co. v. *Estate of Cammon*, 929 F.2d 1220 (7th Cir. 1991) 8, 18

Mullins v. *Beatrice Pocahontas Co.*, 489 F.2d 260 (4th Cir. 1974) 16

Neat-N-Tidy Co. v. *Tradepower (Holdings) Ltd.*, 777 F. Supp. 1153 (S.D.N.Y. 1991) 15

Nerco Delmar Co. v. *North American Silver Co.*, 702 F. Supp. 809 (D. Idaho 1989) 13

North Star Hotels Corp. v. *Mid-City Hotel Assocs.*, 696 F. Supp. 1265 (D. Minn. 1988) 18

Ortiz Mercado v. *Puerto Rico Marine Mgt., Inc.*, 736 F. Supp. 1207 (D.P.R. 1990) 15

Owen Equipment & Erection Co. v. *Kroger*, 437 U.S. 365 (1978) 20-21

Riggs v. *Island Creek Coal Co.*, 542 F.2d 339 (6th Cir. 1976) 13

Rodriguez v. *SK & F Co.*, 833 F.2d 8 (1st Cir. 1987) 14-15

Scot Typewriter Co. v. *Underwood Corp.*, 170 F. Supp. 862 (S.D.N.Y. 1959) 11, 13, 15

St. Louis and S.F. Ry. Co. v. *James*, 161 U.S. 545 (1896) 7

Topp v. *Compair Inc.*, 814 F.2d 830 (1st Cir. 1987) 14-15

United Nuclear Corp. v. *Moki Oil and Rare Metals Co.*, 364 F.2d 568 (10th Cir. 1966) 10-11

U.S.I. Properties Corp. v. *M.D. Constr. Co.*, 860 F.2d 1 (1st Cir. 1988), *cert. denied*, 490 U.S. 1065 (1989) 15

Vareka Investments, N.V. v. *American Investment Properties, Inc.*, 724 F.2d 907 (11th Cir.), *cert. denied*, 469 U.S. 826 (1984) 19

Wheelabrator Frackville Energy Co. v. *Morea Culm Servs., Inc.*, 741 F. Supp. 536 (E.D. Pa. 1990) 16

White v. *Halstead Indus., Inc.*, 750 F. Supp. 395 (E.D. Ark. 1990) 18

Wisconsin Knife Works v. *National Metal Crafters*, 781 F.2d 1280 (7th Cir. 1986) 10, 13

TABLE OF AUTHORITIES—Continued

	Page
STATUTES:	
28 U.S.C. § 1254(1)	2
28 U.S.C. § 1332	*passim*
Pub. L. No. 85-554, 72 Stat. 415 (1958)	7
RULES:	
S. Ct. Rule 10.1(a)	6
LEGISLATIVE MATERIALS:	
S. Rep. No. 1830, 85th Cong., 2d Sess. 4 (1958)	7, 9
H.R. Rep. No. 1706, 85th Cong., 2d Sess. 4 (1958)	7, 9-10
Jurisdiction of Federal Courts Concerning Diversity of Citizenship: Hearing on H.R. 2516 and H.R. 4497 Before Subcomm. No. 3 of the House Comm. on the Judiciary, 85th Cong., 1st Sess. 8 (1957)	7, 9
104 Cong. Rec. 126888 (June 30, 1958)	9
OTHER AUTHORITIES:	
1 James W. Moore et al., *Moore's Federal Practice* ¶¶ 0.77[1.—1], 0.77 [1.—2] (2d ed. 1993)	8, 11
13B Charles A. Wright et al., *Federal Practice and Procedure* §§ 3624, 3625 (2d ed. 1984)	8
James W. Moore and Donald T. Weckstein, *Corporations and Diversity of Citizenship Jurisdiction: A Supreme Court Fiction Revisited*, 77 Harv. L. Rev. at 1439	8
The Statistical Tables for the Twelve Month Period Ended June 30, 1993 (to be published by the Administrative Office of the United States Courts, Statistics Division, Analysis and Reports Branch)	22

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PETITION FOR A WRIT OF CERTIORARI

Petitioner The Anschutz Corporation respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit entered in the above-captioned case on September 13, 1993.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit is reported at 7 F.3d 909 and is reprinted in the appendix hereto ("App.") at 1a. The Findings of Fact and Conclusions of Law of the United States District Court for the District of Wyoming are unreported and are reprinted at App. 30a.

JURISDICTION

Respondents Amoco Rocmount Company and Champlin Petroleum Company initiated this case by filing a complaint against petitioner The Anschutz Corporation in the United States District Court for the District of Wyoming in 1986. App. 33a. Jurisdiction was based on alleged diversity of citizenship under 28 U.S.C. § 1332. After a trifurcated trial in December 1988 and August 1989, the district court issued findings of fact and conclusions of law on July 30, 1990. *Id.* at 30a. When a judgment was entered ordering The Anschutz Corporation to pay $29,324,113.31, petitioner appealed to the Tenth Circuit.

On September 13, 1993, the Tenth Circuit affirmed the district court's judgment—except with respect to prejudgment interest issues which were remanded. *Id.* at 1a. On October 22, 1993, the court of appeals denied petitioner's timely petition for rehearing and suggestion for rehearing en banc. *Id.* at 56a-57a. The jurisdiction of this Court to review the judgment below is based on 28 U.S.C. § 1254(1).

PERTINENT STATUTORY PROVISION

Section 1332 of Title 28, United States Code, provides in pertinent part:

> (c) For the purposes of this section and section 1441 of this title—
>
> > (1) a corporation shall be deemed a citizen of any State by which it has been incorporated and of the State where it has its principal place of business * * *.

STATEMENT OF THE CASE

Amoco Rocmount Company ("Rocmount") of Denver, Colorado was formed in 1982 as a wholly-owned subsidiary of Amoco Production Company ("Production"), which in turn was a subsidiary of Amoco Corporation

("Amoco"). Rocmount was formed under the laws of Delaware and had officers and a Board but no other non-officer employees and no separate bank accounts.[1]

Rocmount's sole business was to own and operate an interest in an oil and gas field known as the Anschutz Ranch East Unit ("AREU") which had reserves in Wyoming and Utah. On October 27, 1982, Production conveyed its oil and gas interests in the AREU to Rocmount. In the conveyance, both Production and Rocmount were listed as having the same Denver address. Conveyance at 1, 4. The conveyance was drafted in Denver by an individual located in Denver, signed for Rocmount by a vice-president located in Denver, and executed by all parties in Denver. Gates Dep. at 36-37. The recorded copy was kept in Denver. *Id.* at 39.

Simultaneously, on October 27, 1982, Rocmount engaged Production to manage its interests in and operations of the AREU. The management agreement was drafted in Denver, gave the same address in Denver as the location of both parties for notice purposes, and, most importantly, provided that the agreement would be "governed by the laws of the State of Colorado." *Id.* at 41-42, 49-50; Management Agreement, p. 6, Art. 11.

The following month, a unit agreement and a unit operating agreement for the AREU area were executed between Rocmount and various working interest owners. Of the twelve signatories to both agreements, nine were located in Colorado. The unit agreement provided that it was to be governed by the law of Colorado. Unit Agreement, par. 32. The unit operating agreement, which was signed in Denver, provided that in the event certain types of disputes arose, they would be arbitrated in Denver in accordance with the Colorado Uniform Arbitration Act. Furthermore, if the parties could not agree on

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[1] Deposition of Stephen F. Gates, June 24, 1987 ("Gates Dep.") at 24, 33, 43.

an arbitration coordinator, he/she would be appointed by the Chief Justice of the Supreme Court of Colorado. Unit Operating Agreement, Art. 29, par. 29.1; Ex. 7, pars. 1.1, 3.5. The agreement also provided that the usury laws of Colorado would apply. *Id.* at par. 7.14; *see also id.* at par. 7.16.

Rocmount filed no federal income taxes in its own right, but Amoco filed corporate returns in Colorado on its behalf. Gates Dep. at 14-15. While Rocmount was not qualified to do business in Illinois, it was qualified in Colorado. *Id.* at 15-16, 22. It had an agent for service of process in Colorado. *Id.* at 17. At least thirteen of its officers were located in Colorado when they served with Rocmount,[2] and as far as the record reflects, *none* of its officers or directors ever lived in Utah or Wyoming. *Id.* at 25.

The Rule 30(b)(6) designated representative of Rocmount had been an Assistant Secretary of Rocmount at the time of the company's formation, was in the law department of Production at the time of his deposition, and during this entire period was located in Denver. *Id.* at 4-5. Rocmount's staff functions were carried out in Production's Denver office. *Id.* at 6. A Rocmount vice-president was regional vice-president for Production, based in Denver. *Id.* at 7. Another Rocmount vice-president, also located in Denver, gave "guidance and input on the operations" in Wyoming and chaired the working interest owners' committee for the AREU. *Id.* at 7-9.

When a dispute broke out between the various interest owners in the AREU, Rocmount and Champlin Petroleum Company brought this diversity action against The Anschutz Corporation ("Anschutz"), a Kansas corporation with its principal place of business in Colorado. One of the early issues in the case was whether there was

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[2] Messrs. Brannon, Burton, Gates, Gilliam, Houck, Hubman, Krol, Miller, Neely, Sonders, Wewerka, Wight, Vanderbeek.

jurdisdiction under 28 U.S.C. § 1332, since Anschutz claimed that Rocmount's principal place of business was in Colorado, the same state where Anschutz was principally located.

Rocmount first claimed that its principal place of business was in either Illinois or Wyoming. It developed, however, that the company was not even licensed to do business in Illinois, so it then claimed that its principal place of business was in either Wyoming or Utah. The United States District Court for the District of Wyoming held that despite the plain language of Section 1332(c) ("*the* State where [the corporation] has its principal place of business") (emphasis added), the court need not determine where the company's principal place of business was so long as it decided that it was not in Colorado. The court rejected the "nerve center" test adopted in some Circuits in favor of the "center of activity" test developed by the Third Circuit. App. 45a-46a. Under this test, it held that Rocmount's principal place of business was in either Wyoming or Utah. *Id.* at 46a.

The Tenth Circuit affirmed, though on the basis of still another test—that of "total activity." *Id.* at 8a. After laying out the split in the Circuits on the jurisdictional question at the core of all corporate diversity cases, it held that the focus of Rocmount's activities was "the AREU, which spans two states, Wyoming and Utah," and therefore Rocmount's principal place of business was not Colorado. *Id.* at 10a.

REASONS FOR GRANTING THE WRIT

This Court should grant certiorari to resolve the conflict among the Circuits over the proper test to determine a corporation's principal place of business. *See* S. Ct. Rule 10.1(a). This is not a case in which the existence of a Circuit conflict needs to be inferred from an analysis of allegedly conflicting cases. Instead, Judge Logan, who authored the panel opinion, explicitly recognized that the Circuits apply three entirely different tests: the "nerve center" test, the "corporate activities" test, and the "total activity" test. App. 7a. The panel chose from among these the "total activity" test and held that under it, Rocmount's principal place of business was in either Utah or Wyoming.

The Tenth Circuit thus erred in two key respects when it affirmed the district court's finding of jurisdiction through diversity of citizenship. First, the court's decision to adopt the "total activity" test instead of continuing to apply the "nerve center" test, as it had previously done, and the Court's refusal to determine *the* principal place of business of Rocmount, are contrary to the statute's plain language and to the clear intent of Congress, as demonstrated by the legislative history of the "principal place of business" amendment. Second, even if this Court were to accept the framework adopted below, the court misapplied the "total activity" test by determining that Rocmount's principal place of business was not Colorado simply because its assets were located in Wyoming and Utah. App. 10a.

1. The Statute and Its History

On July 25, 1958, Congress amended 28 U.S.C. § 1332 to include, *inter alia,* the following language:

> (c) For the purposes of this section and section 1441 of this title, a corporation shall be deemed a citizen of any State by which it has been incorporated and of the State where it has its principal place of

business. [Pub. L. No. 85-554, 72 Stat. 415 (1958).]

The first part of this subsection codified this Court's determination that a corporation should be treated as a citizen of its state of incorporation for purposes of diversity jurisdiction. *See, e.g., St. Louis and S.F. Ry. Co.* v. *James,* 161 U.S. 545, 562 (1896). But the amendment went further than this Court had previously gone by also treating a corporation as a citizen of the state of its prinicipal place of business.

The "principal place of business" clause was enacted to combat "the evil whereby a local institution, engaged in a local business and in many cases locally owned, is enabled to bring its litigation into the Federal courts simply because it has obtained a corporate charter from a different State." S. Rep. No. 1830, 85th Cong., 2d Sess. 4 (1958); H.R. Rep. No. 1706, 85th Cong., 2d Sess. 4 (1958). Representative Ashley, who introduced the language eventually enacted as Section 1332(c), stated, "I do not believe it is either fair or proper for a corporation to avoid trial in the State in which it operates or has its principal place of business by resorting to a legal device not available to the individual citizen. The change I have outlined would correct this abuse." *Jurisdiction of Federal Courts Concerning Diversity of Citizenship: Hearing on H.R. 2516 and H.R. 4497 Before Subcomm. No. 3 of the House Comm. on the Judiciary,* 85th Cong., 1st Sess. 8 (1957) ("*Hearing*").

The amendment was suggested in the September 24, 1951 revised report of the Judicial Conference's Commitee on Jurisdiction and Venue, *reprinted in Hearing* at 24-25. The language was lifted from the Bankruptcy Code, and judicial precedents interpreting that language were intended to govern the scope of the language in the diversity context. *Id.* at 25; S. Rep. No. 1830, *supra,* at 5; H.R. Rep. No. 1706, *supra,* at 4. Unfortunately,

"[t]he determination of the principal place of business has not been as simple a matter as the words of the standard might suggest. Not only are the precedents complicated and inconsistent, but attention must be given to the fact that the Bankruptcy Act served very different purposes than does diversity of citizenship jurisdiction." 13B Charles A. Wright et al., *Federal Practice and Procedure* § 3625 (2d ed. 1984). *See also* James W. Moore and Donald T. Weckstein, *Corporations and Diversity of Citizenship Jurisdiction: A Supreme Court Fiction Revisited*, 77 Harv. L. Rev. 1426, 1439 (1964) ("ample precedent there was, but consistent precedent there was not").

The language and background of the "principal place of business" amendment nevertheless provides clear guidance on the scope of the statute. First, it is clear from the plain language of the amendment that each corporate litigant has one principal place of business.[3] Testifying

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[3] For a discussion of the equitable necessity of determining a single principal place of business for each corporate litigant, *see infra*. Commentators and courts unanimously agree that a corporation must have one and only one principal place of business. *E.g.*, James W. Moore and Donald T. Weckstein, *Corporations and Diversity of Citizenship Jurisdiction: A Supreme Court Fiction Revisited*, 77 Harv. L. Rev. at 1439 ("it was anticipated that every corporation would have one, and only one, principal place of business"); 13B Charles A. Wright et al., *Federal Practice and Procedure* § 3624 ("Section 1332(c) clearly requires that every corporation must have one—*but only one*—principal place of business") (emphasis in original); 1 James W. Moore et al., *Moore's Federal Practice* ¶ 0.77[1.—2] (2d ed. 1993) ("a corporation has only *one* principal place of business") (emphasis in original). *See also Gafford* v. *General Elec. Co.*, 997 F.2d 150, 161 (6th Cir. 1993) ("a corporation can have only one *principal* place of business for purposes of establishing its state of citizenship") (court's emphasis); *Metropolitan Life Ins. Co.* v. *Estate of Cammon*, 929 F.2d 1220, 1223 (7th Cir. 1991) ("Although some courts have rejected the nerve center approach, all agree that corporations have *one* 'principal' place of business * * *") (citation omitted; court's emphasis); *J.A. Olson Co.* v. *City of Winona*, 818 F.2d 401, 406 (5th Cir. 1987) ("every corporation has one and only one principal place of business").

before Subcommittee No. 3 of the House Committee on the Judiciary, Judge Albert B. Maris presented the views of the Judicial Conference's Committee on Jurisdiction and Venue:

> [T]he law should be amended so that a corporation shall be regarded not only as a citizen of the State of its incorporation, but also it shall be regarded as a citizen of the State in which it maintains its principal place of business, which would eliminate those corporations doing a local business with a foreign charter; but it would not eliminate those corporations which do business over a large number of States, such as the railroads and the insurance companies and other corporations whose business is not localized in one particular State. Even such a corporation, however, would be regarded as a citizen of that one of the States in which it did business, in which was located its principal place of business, if such a place could be identified. [*Hearing* at 29-30.]

In both the House and the Senate Reports, this view of the scope of the "principal place of business" language was adopted—almost verbatim—but with one significant difference: both Reports omit the language from Judge Maris's statement to the effect that a corporation might not have a discernible principal place of business. *See* S. Rep. No. 1830, *supra*, at 5 (a "corporation[] which do[es] business over a large number of States * * * would be regarded as a citizen of that one of the States in which was located its principal place of business"); H.R. Rep. No. 1706, *supra*, at 4 (same). Thus, Congress adopted Judge Maris's view that a corporation has one principal place of business but rejected his caveat that the principal place might not always be identifiable. *See* 104 Cong. Rec. 126888 (June 30, 1958) (statement of Rep. Keating) ("A corporation doing business all over the country could still resort to the Federal courts in every State except that in which it was incorporated or in which it had its principal place of business").

Second, the determination of which state contains a corporation's principal place of business is likewise clear from the background of the statute. As discussed above, the cases interpreting the Bankruptcy Act language fail to give helpful guidance. In fact, Congress had before it during consideration of this amendment only one clear statement of how the statute would be applied. In determining which state contained a corporation's principal place of business, Judge Maris stated:

> I think the courts have generally taken the view that where a corporation's interests are rather widespread, the principal place of business is an actual rather than a theoretical or legal one. It is the actual place where its business operations are coordinated, directed and carried out, which would ordinarily be the place where its officers carry on its day-to-day business, where its accounts are kept, where its payments are made, and not necessarily a State in which it may have a plant, if it is a big corporation, or something of that sort. [*Hearing* at 37.]

Congress, therefore, enacted Section 1332(c)'s "principal place of business" language with the intention of treating multi-state corporations as citizens of the state in which they are incorporated and the state in which their headquarters are located, where management operations take place. This is the "nerve center" test—an easily-applied standard that fosters certainty in jurisdictional determinations. *See Wisconsin Knife Works* v. *National Metal Crafters,* 781 F.2d 1280, 1282 (7th Cir. 1986).

Prior to its decision in the instant case, the Tenth Circuit's only foray into the principal place of business issue had been in *United Nuclear Corp.* v. *Moki Oil and Rare Metals Co.,* 364 F.2d 568 (10th Cir. 1966). In that case, the court announced,

> Where a corporation carries on its business in a number of states, no one of which is clearly the state in which its business is principally conducted, the state

> where a substantial part of its business is transacted and from which centralized general supervision of all of its business is exercised, is the state in which it has its principal place of business. [*Id.* at 570.]

Though the court in *United Nuclear* twice cited *Scot Typewriter Co.* v. *Underwood Corp.*, 170 F. Supp. 862 (S.D.N.Y. 1959), the seminal "nerve center" decision—*see* 364 F.2d at 570 nn.8, 9—the panel in the instant case asserts that its adoption of the "total activity" test is consistent with *United Nuclear*. App. 8a. In reality, the decision below represents the Tenth Circuit's abandonment of the "nerve center" test. But whether couched as evolution or revolution, the court's explicit adoption of the "total activity" test was erroneous because the language and background of Section 1332(c) clearly indicates that the "nerve center" test should be applied.

Even if this Court were to adopt the "total activity" test, the Tenth Circuit misapplied it in this case in a way that is contrary to the very purpose of the underlying statute. It is well established that the purpose of the "principal place of business" amendment was to lessen the number of cases in the federal system. *See, e.g., J.A. Olson Co.*, 818 F.2d at 405 ("The amendment was intended to reduce the case load of the federal courts * * *"). *See also* 1 James W. Moore et al., *Moore's Federal Practice* ¶ 0.77[1.—1] ("To reduce the case load in the federal courts * * *, Congress enacted the amendatory Act of July 25, 1958"). Federal courts are thus commonly required to determine a corporate litigant's principal place of business. *See Media Duplication Servs., Ltd.* v. *HDG Software, Inc.*, 928 F.2d 1228, 1236 (1st Cir. 1991) ("In order to find diversity jurisdiction, a federal court must identify the principal place of business of a corporation"); *J.A. Olson Co.*, 818 F.2d at 406 ("we are to search for a single [principal] place").

If a court fails to identify the corporate litigant's principal place of business, it runs the risk of letting a case

proceed where jurisdiction is lacking. The Second Circuit, thirty years ago, recognized the potential pitfalls of such a failure:

> The argument of appellants that jurisdiction should be sustained because "the vast majority of key activities and situs of operations of the * * * airline were performed and located outside of the State of New York" is untenable for the reason that it would lead to a ruling that American Airlines, Inc., or any other corporation which does not conduct the majority of its activities in a single state, has no principal place of business in any state—a result clearly not contemplated by the Congress. [*Egan* v. *American Airlines, Inc.*, 324 F.2d 565, 566 (2d Cir. 1963) (court's ellipsis).]

Despite this peril, the Tenth Circuit in its decision below held that determining a party's citizenship is sometimes unnecessary. App. 9a-10a n.3 ("such a finding is not always necessary").

The district court's failure to identify Rocmount's principal place of business and the Tenth Circuit's decision to lend its imprimatur to that failure were erroneous. Focusing solely on the fact that Rocmount's primary assets were located in Wyoming and Utah, both courts concluded that Colorado could not be Rocmount's principal place of business. But it is in just such circumstances that the "total activity" test—which combines the "nerve center" test and the "corporate activites" test—mandates the finding of a corporation's principal place of business in the state where its operations are controlled: "when considering a corporation whose operations are far flung, the sole nerve center of that corporation is more significant in determining principal place of business." *J.A. Olson Co.*, 818 F.2d at 411. Because the record demonstrates that Rocmount's corporate activities took place in Colorado and not in Wyoming or Utah, the Tenth Circuit erred—even under the "total activity" test—when it failed to determine Rocmount's "nerve center" and to choose

the state where it was located as the corporation's principal place of business.[4]

2. The Split in the Circuits.

The confusion in regard to principal place of business is not centered in the Tenth Circuit. It is rampant throughout the Circuit courts that cannot agree on which of several tests is the proper one under this binding federal statute.

The "nerve center" test traces its judicial roots to *Scot, supra.* In *Scot,* the court held, "Where a corporation is engaged in far-flung and varied activities which are carried on in different states, its principal place of business is the nerve center * * * from which its officers direct, control and coordinate all activities without regard to locale." 170 F. Supp. at 865. In explaining why the Seventh Circuit adopted the "nerve center" test, Judge Posner wrote, "Some courts use a vaguer standard. They look not just where the corporation has its headquarters but also to the distribution of the corporation's assets and employees. We prefer the simpler test. Jurisdiction ought to be readily determinable." *Wisconsin Knife Works,* 781 F.2d at 1282 (citation omitted).

The so-called "corporate activities" test is really two distinct tests. In *Kelly* v. *United States Steel Corp.,* 284

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[4] Some courts have argued that "the principal place of business of a mining corporation is not determined by the 'nerve center' test, but rather by a 'place of operations' test." *Nerco Delamar Co.* v. *North American Silver Co.,* 702 F. Supp. 809, 811 (D. Idaho 1989). A rule specific to mining corporations can hardly be divined from the legislative history of Section 1332(c). But even if the location of assets properly predominated in the "principal place of business" analysis for some mining corporations, the "nerve center" test would still be applied where the corporation's operations were not located primarily in a single jurisdiction. *See Riggs* v. *Island Creek Coal Co.,* 542 F.2d 339, 342 (6th Cir. 1976) (identifying mining corporation's principal place of business in state where "nerve center" was located because physical mining operations were in more than one state).

F.2d 850, 854 (3d Cir. 1960), the Third Circuit announced its intention to determine a corporation's principal place of business based primarily on the location of the "headquarters of day-to-day corporate activity and management," though it would consider "elements of lesser importance" like the physical location of the corporation's plants. The other "corporate activities" test, usually traced to *Inland Rubber Corp.* v. *Triple A Tire Service, Inc.*, 220 F. Supp. 490 (S.D.N.Y. 1963), is very different. It says that "if any one state contains a substantial predominance of corporate operations, including personnel, as compared with any other single state, then in that state lies the 'principal place of business' of the corporation within the meaning of 28 U.S.C. § 1332(c)." *Id.* at 496. The *Inland Rubber* court went on to emphasize that "[t]his holds true even though * * * the locus of over-all direction and control lies in another state." *Id.*

The "total activity" test combines both "nerve center" and *Kelly* "corporate activities" analyses. Its application requires a district court (1) to determine both the "nerve center" and the "place of activities" of the corporate litigant, and (2) to balance the particular facts of the case to determine which locale should predominate. *See J.A. Olson Co.*, 818 F.2d at 412.

An analysis of the tests applied by the various Circuits reveals a thicket of different approaches leading to different results in cases presenting identical circumstances. A brief Circuit-by-Circuit review demonstrates this untenable situation.

The First Circuit "has developed three separate tests for determining a corporation's principal place of business * * *." *Rodriguez* v. *SK & F Co.*, 833 F.2d 8, 9 (1st Cir. 1987). They are (1) the "nerve center" test, (2) the "center of corporate activities" test, and (3) the "locus of the operations of the corporation" test. *See Topp* v. *Compair Inc.*, 814 F.2d 830, 834 (1st Cir. 1987); *de Walker* v. *Pueblo Int'l, Inc.*, 569 F.2d 1169,

1171-72 (1st Cir. 1978); *Ortiz Mercado* v. *Puerto Rico Marine Mgt., Inc.*, 736 F. Supp. 1207, 1211 (D.P.R. 1990). The court has offered virtually no guidance on when each test should be applied, and the tests themselves are ill-defined.[5] In attempting to harmonize the First Circuit's jurisprudence, the most that can be said is that courts in that Circuit most often appear to apply the "nerve center" test to determine corporate citizenship. *E.g., U.S.I. Properties Corp.* v. *M.D. Constr. Co.*, 860 F.2d 1, 6 (1st Cir. 1988), *cert. denied*, 490 U.S. 1065 (1989) (finding principal place of business in New York where "policy decisions were made in New York, where the administrative offices were located, and * * * the last tax returns had been filed in New York); *Topp*, 814 F.2d at 834 ("the district court was thus correct in deciding to apply the nerve center test * * *"); *Ortiz Mercado*, 736 F. Supp. at 1211 ("After careful consideration of all the evidence, we find the 'nerve center' test the most appropriate to this case").

Like the First Circuit, the Second Circuit does not apply one test in all circumstances. The "nerve center" test developed in *Scot, supra*, remains viable. *Neat-N-Tidy Co.* v. *Tradepower (Holdings) Ltd.*, 777 F. Supp. 1153, 1156 (S.D.N.Y. 1991). But the corporate activities test, as explained in *Inland Rubber*, may also be applied in certain circumstances. *Id.* "The approach to be applied shall be the one most appropriate to the facts of the case." *Id. See also Egan* v. *American Airlines, Inc.*, 324 F.2d at 566 (purporting to harmonize *Scot* and *Kelly*). Again, any real guidance on how and when to apply each test is lacking.

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[5] One district court judge complained, "Having found virtually no First Circuit precedent on the 'center of corporate activity test,' we * * * will not consider it separately from the 'locus of operations' test * * *." *Ortiz Mercado*, 736 F. Supp. at 1211 n.6.

The Third Circuit spawned *Kelly, supra,* which is the seminal case applying one version of the "corporate activities" test. Courts within the Third Circuit continue to follow *Kelly*'s lead by focusing on the management of the corporation and not on the party's tangible assets: "[W]hile factors of lesser importance, *e.g.* location of physical plants, employees and assets, would support a finding that Pennsylvania is the principal place of business of plaintiff, plaintiff has clearly established that New Hampshire is the 'headquarters of day-to-day corporate activity and management.'" *Wheelabrator Frackville Energy Co.* v. *Morea Culm Servs., Inc.*, 741 F. Supp. 536, 539-540 (E.D. Pa. 1990).

The *Wheelabrator* case is a good example of a fact pattern that yields different results when different analyses are used. As the *Wheelabrator* decision shows, using the *Kelly* "corporate activities" test makes New Hampshire the principal place of business because day-to-day operations are controlled there. Under the *Inland Rubber* "corporate activities" test, Pennsylvania would be the principal place of business because the corporation's plants and employees are located there. Under the "nerve center" test, the principal place of business could be still a third state if the corporation's overall corporate headquarters were located somewhere besides New Hampshire or Pennsylvania. Under the "total activity" test, the trial court would have to balance the facts to determine which of the several jurisdictions qualifies as the principal place of business.

The Fourth Circuit has thus far declined to choose which test should be applied. *See Mullins* v. *Beatrice Pocahontas Co.*, 489 F.2d 260, 262 (4th Cir. 1974) ("intimating no view as to which of these positions ['nerve center' or 'corporate activities'] this court will ultimately adopt * * *"). Two recent district court cases within the Fourth Circuit have applied different tests. In *Arbee Mechanical Contractors, Inc.* v. *Capital Sun Corp.*, 683 F. Supp. 144, 147 (E.D. Va. 1988), Judge Ellis applied

the *Inland Rubber* test to find that a corporation's principal place of business was Virginia because its employees performed most of their labor in Virginia, production facilities were in Virginia, and the corporation's "laborers and other non-executive personnel" were primarily in Virginia. Meanwhile, in *Carolina Carbon and Stainless Products, Inc.* v. *IPSCO Corp.*, 635 F. Supp. 305, 310 (W.D.N.C. 1986), the court applied a *Kelly*-like analysis and determined that, because "the employees primarily involved in the day-to-day management of the Defendant's overall operations are based in Charlotte," North Carolina was the corporation's principal place of business.

The Fifth Circuit created and continues to apply the "total activity" test. *See Anniston Soil Pipe Co.* v. *Central Foundry Co.*, 216 F. Supp. 473 (N.D. Ala. 1963), *aff'd*, 329 F.2d 313 (5th Cir. 1964) (credited with developing "total activity" test). *See also Harris* v. *Black Clawson Co.*, 961 F.2d 547, 549 (5th Cir. 1992) ("This circuit applies the 'total activity' test * * *"); *Grinter* v. *Petroleum Operation Support Serv., Inc.*, 846 F.2d 1006, 1008 (5th Cir. 1988) (same). The Fifth Circuit's definition of "total activity" calls for a district court to determine both the "nerve center" and the center of "corporate activities," and then to balance those determinations according to the corporation's character:

> (1) when considering a corporation whose operations are far flung, the sole nerve center of that corporation is more significant in determining principal place of business; (2) when a corporation has its sole operation in one state and executive offices in another, the place of activity is regarded as more significant; but (3) when the activity of a corporation is passive and the "brain" of the corporation is in another state, the situs of the corporation's "brain" is given greater significance. [*J.A. Olson Co.*, 818 F.2d at 411 (citations omitted).]

The Sixth Circuit, quoting extensively from *J.A. Olson,* has just recently adopted the "total activity" test. *Gafford* v. *General Elec. Co.,* 997 F.2d at 163 ("we take this opportunity to direct courts in this circuit to employ the total activity test").

The Seventh Circuit is the leading proponent of the "nerve center" test. The straightforward analysis required by this test is as follows: "a corporation has a single principal place of business where its executive headquarters are located." *Metropolitan Life Ins. Co.* v. *Estate of Cammon,* 929 F.2d at 1223. *See also Buethe* v. *Britt Airlines, Inc.,* 787 F.2d 1194, 1196 (7th Cir. 1986) ("The principal place of business * * * is where the corporation's nerve center is"); *Kanzelberger* v. *Kanzelberger,* 782 F.2d 774, 777 (7th Cir. 1986) ("a corporation's principal place of business is the place where the corporation has its nerve center").

The Eighth Circuit has not decided which test should be applied by district courts in its bailiwick. Judges in those district courts, however, seem to follow the "total activity" test. *See White* v. *Halstead Indus., Inc.,* 750 F. Supp. 395, 398 (E.D. Ark. 1990); *North Star Hotels Corp.* v. *Mid-City Hotel Assocs.,* 696 F. Supp. 1265, 1270 (D. Minn. 1988); *Associated Petroleum Producers, Inc.* v. *Treco 3 Rivers Energy Corp.,* 692 F. Supp. 1070, 1074 (E.D. Mo. 1988).

The Ninth Circuit applies the "nerve center" test in certain circumstances and the *Inland Rubber* "corporate activities" test in others. *See Danjaq, S.A.* v. *Pathe Communications Corp.,* 979 F.2d 772, 776 (9th Cir. 1992). Guidance on when to use each standard is limited:

> [W]here a majority of a corporation's business activity takes place in one state, that state is the corporation's principal place of business, even if the corporate headquarters are located in a different state. The "nerve center" test should only be used when no state contains a substantial predominance of the

> corporation's business activities. [*Industrial Tectonics, Inc.* v. *Aero Alloy*, 912 F.2d 1090, 1094 (9th Cir. 1990).]

This rubric differs from the Fifth Circuit's "total activity" analysis in two key respects: (1) the district court is apparently not obligated to determine both the "nerve center" and the center of "corporate activities" in each case, and (2) the Ninth Circuit fails to require trial judges to balance the importance of operations against the importance of management activities in cases where operations occur predominantly in one state.

Following Fifth Circuit precedent, the Eleventh Circuit applies the "total activity" test. *Vareka Investments, N.V.* v. *American Investment Properties, Inc.*, 724 F.2d 907, 910 (11th Cir.), *cert. denied*, 469 U.S. 826 (1984). As in the Fifth Circuit, the analysis in the Eleventh Circuit requires balancing both the place of "corporate activities" and the "nerve center" of the corporate litigant. *Id.*

The District of Columbia Circuit, like the Fourth and Eighth Circuits, has not determined which test should be applied by district courts in its jurisdiction. A recent district court case, however, applied the "nerve center" arm of the "total activity" analysis: "When no one state is clearly the center of corporate activity or accounts for a majority of the company income, the headquarters logically assumes greater importance in determination of the principal place of business." *Masterson-Cook* v. *Criss Bros. Iron Works, Inc.*, 722 F. Supp. 810, 812 (D.D.C. 1989). Because operations occurred in unknown proportions in three jurisdictions, the court determined that the state where the corporate headquarters was located was the corporation's principal place of business. *Id.*

As the foregoing makes clear, there is a significant and irreconcilable conflict among the Circuits on the questions presented. The acknowledged conflict is well developed and has been fully aired in the published opinions of all

but a few United States Courts of Appeals. In each instance, the precedents enjoy continued vitality. The questions presented will not naturally resolve themselves, as where courts may have failed to recognize binding precedents from this Court. While tests applied by individual Circuits may evolve, the disparity that exists today between, for example, the Seventh Circuit's "nerve center" approach and the Third Circuit's "center of corporate activity" test is striking.

Even more troubling, Circuits like the First, Second and Ninth have not adopted a single test for general application. And even when a Circuit chooses a test—as the Tenth Circuit has chosen the "total activity" test in the instant case—unclear parameters allow for erroneous application. The conflict concerns an important and recurring issue of federal law. *See infra.* Cases presenting courts in different Circuits with identical facts will sometimes yield federal jurisdiction in one case and not in the other. This Court should grant the writ to resolve the acknowledged split.

3. The Issue Is One Deserving Review.

This Court has never explicitly discussed the proper test to use in determining a corporation's principal place of business. In *Owen Equipment & Erection Co.* v. *Kroger*, 437 U.S. 365 (1978), the Court confronted an issue of diversity jurisdiction in cases involving ancillary jurisdiction. Though the Court did not directly address the questions presented, Justice Stewart, writing for the Court, did comment on the confusion at trial as to petitioner's principal place of business: "The problem was apparently one of geography. Although the Missouri River generally marks the boundary between Iowa and Nebraska, Carter Lake, Iowa, where the accident occurred and where Owen had its main office, lies west of the river, adjacent to Omaha, Neb." *Id.* at 369 n.5. By acceding to the conclusion that Owen's principal place of business

was in Iowa, *id.* at 369, the Court implied that a corporation's "nerve center," *i.e.*, its "main office," has some role in the determination of its citizenship for diversity purposes.

The plain language of the statute and the unanimous view of commentators and other courts [6] is that a company has a single principal place of business. Yet the two courts below never held what that place was for Rocmount. They concluded instead that it was in either Utah or Wyoming. This is an abdication of judicial responsibility. Instead of the burden being on the plaintiff to prove diversity, it places the burden on the defendant to prove that the plaintiff's principal place is different from some moving target. If the defendant shows that it could not have been Utah, the plaintiff relies on Wyoming; if Wyoming compares illogically with Colorado, the plaintiff shifts back to Utah.

The facts in this case demonstrate beyond doubt that under any test except possibly the one adopted by the Tenth Circuit, Rocmount's principal place of business was in Colorado. Virtually every aspect of its control and operation—except those activities undertaken in Illinois, where it was not even licensed to do business—were carried on in Colorado. Whether one looks to Rocmount itself or to Production, which acts for Rocmount in connection with the AREU under the management agreement, one finds the focus of activities centered in Colorado. It was Colorado law to which the parties themselves looked to govern their operations and interrelationships. The address for both Rocmount and Production was in Colorado. Rocmount's agent and designated representative, and most of its officers, were located there. Thus, Colorado was, in the words Judge Maris used in describing a typical principal place of business, "the actual place where [the company's] business operations are coordinated, directed and carried out." Wyoming and

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[6] *See* n.3, *supra.*

Utah were solely the passive site of oil and gas reserves that were the object of Rocmount's and Production's operations—comparable to the "plant" that Judge Maris told Congress would *not* constitute a principal place of business.[7]

But whether or not petitioner is correct as to the proper test to be applied, the important point is that this wide divergence among the Circuits in their interpretation of this vitally important federal statute is intolerable. Over 50,000 diversity cases were filed last year in the federal district courts,[8] and 28 U.S.C. § 1332(c) was the jurisdictional cornerstone for each case involving a corporation. Federal courts have no business handling these cases where diversity does not truly exist. When diversity is challenged, the plaintiff should have to show *the* state where its principal place of business is located, and the definition used to determine that principal place should be uniform throughout the nation. It makes no sense for even adjoining states—such as Ohio in the Sixth Circuit and Indiana in the Seventh—to be using different interpretations of this key statutory phrase.

Moreover, there are very practical reasons why courts should be required to locate a single principal place. When such a place is not located, a company with widespread business interests—ten percent of sales in each of ten states, for example, or sales, headquarters, plants, offices and tax returns all located in different states—can effectively choose or avoid any forum it wishes. If it

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[7] Furthermore, though the "total activity" test looks to a corporation's "nerve center" or its headquarters for day-to-day management rather than its assets, there is no indication that Rocmount's passive reserves are either predominantly in Wyoming or predominantly in Utah.

[8] The Statistical Tables for the Twelve Month Period Ended June 30, 1993, Table C2 (to be published by the Administrative Office of the United States Courts, Statistics Division, Analysis and Reports Branch).

wants its principal place to be in Kansas because that would destroy diversity, it can show that its interests are centered there as much as in any of the other nine states. Similarly, if it wants its principal place to be other than Kansas in order to preserve diversity, it can demonstrate that its interests are located as much in other states as in Kansas. The large company is thus afforded an option that the small company, operating only in one or a few states, does not have; the large company may be able to avoid locating a principal place of business altogether.

The decision below diverges from decisions on the same issue in other Circuits. The panel candidly admitted that a variety of tests have been adopted by different Courts of Appeals. In failing to continue to adhere to the "nerve center" test, the court abandoned the standard compelled by the "principal place of business" amendment. And even if this Court were to sanction use of the "total activity" test, the Tenth Circuit's failure to identify a particular principal place represents an erroneous application of that standard and an additional, independent contravention of Congress's intent. This Court should grant certiorari and determine which analysis federal courts should use in diversity cases involving corporate litigants.

CONCLUSION

For the foregoing reasons, this Court should grant the writ and reverse the decision below.

Respectfully submitted,

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APPENDICES

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 92-8024

AMOCO ROCMOUNT COMPANY, a Delaware corporation, as Unit Operator of, and as an individual interest owner in the Anchutz Ranch East Unit; CHAMPLIN PETROLEUM COMPANY, a Delaware corporation, as an individual interest owner in the Anschutz Ranch East Unit,
Plaintiffs-Appellees,

v.

THE ANSCHUTZ CORPORATION, a Kansas corporation,
Defendant/Third Party Plaintiff-Appellant,

v.

JERRY D. ARMSTRONG; J.H. BANDER; RAY O. BROWNLIE; JAMES B. WALLACE; BWAB, INC.; CHEVRON U.S.A., INC.; MESA PETROLEUM COMPANY; MTS LIMITED PARTNERSHIP; MOBIL ROCKY MOUNTAIN, INC.; PAN CANADIAN PETROLEUM, INC.,
Third Party Defendants-Appellees.

No. 92-8027

AMOCO ROCMOUNT COMPANY, a Delaware corporation, as Unit Operator of, and as an individual interest owner in the Anschutz Ranch East Unit,

Plaintiff-Appellant,

and

CHAMPLIN PETROLEUM COMPANY, a Delaware corporation, as an individual interest owner in the Anschutz Ranch East Unit,

Plaintiff,

v.

THE ANSCHUTZ CORPORATION, a Kansas corporation,

Defendant-Appellee,

v.

JERRY D. ARMSTRONG; J.H. BANDER; RAY O. BROWNLIE; JAMES B. WALLACE; BWAB, INC.; CHEVRON U.S.A., INC.; MESA PETROLEUM COMPANY; MTS LIMITED PARTNERSHIP; MOBIL ROCKY MOUNTAIN, INC.; PAN CANADIAN PETROLEUM, INC.,

Third Party Defendants.

[Filed Sept. 13, 1993]

Appeal from the United States District Court
for the District of Wyoming
(D.C. No. 86-172-B)

James M. Lyons (Frederick J. Baumann and Brent R. Cohen also of Rothgerber, Appel, Powers & Johnson, Denver, Colorado, and James E. Applegate and Alan B.

Minier of Hirst & Applegate, Cheyenne, Wyoming, with him on the briefs), for Defendant-Appellant/Cross-Appellee The Anschutz Corporation.

James A. Clark and Timothy R. Beyer (Fred M. Winner and Peter J. Korneffel, Jr., also of Baker & Hostetler, with them on the briefs), Denver, Colorado, for Plaintiff-Appellee/Cross-Appellant Amoco Rocmount Company.

Before LOGAN, RONEY,* and SEYMOUR, Circuit Judges.

LOGAN, Circuit Judge.

In No. 92-8024, defendant The Anschutz Corporation (Anschutz) appeals the judgment of the district court ruling that it breached a Unit Operating Agreement with plaintiffs Amoco Rocmount Company (Amoco), Champlin Petroleum Company n/k/a Union Pacific Resources Company, and other working interest owners,[1] and ordering it to pay damages of $29,324,113.31. In No. 92-8027, Amoco appeals the judgment of the same court finding in favor of Anschutz on a number of Anschutz's counterclaims against it, and ordering Amoco to pay damages totalling $4,940,585.03.

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* The Honorable Paul H. Roney, Senior United States Circuit Judge, United States Court of Appeals for the Eleventh Circuit, sitting by designation.

[1] Amoco sued in its individual capacity and in its capacity as unit operator, on behalf of the other working interest owners. Champlin joined as a party plaintiff, but the others did not, allowing Amoco to represent them as unit operator. We use "Amoco" to designate all the plaintiffs' interests in appeal No. 92-8024, as well as to identify Amoco in its capacity as defendant on Anschutz's counterclaims.

I

This complex and protracted litigation stems from the discovery in 1979 of a reservoir known as the Anschutz Ranch East Unit (AREU), which Anschutz characterizes as "one of the most significant domestic oil and gas reserve finds since Prudhoe Bay." Opening Br. of Defendant-Appellant at 5. Soon thereafter, the various working interest owners (WIOs) of the AREU commenced negotiations regarding unitization of the field, and the lawyers for the WIOs met frequently over the next two years in an attempt to draft an acceptable agreement. Eventually the parties signed a Unit Agreement and a Unit Operating Agreement, the latter of which is at issue in these cases.

The claim against Anschutz centers on § 5.11 of the thirty-one page Unit Operating Agreement, which we reproduce in its entirety:

> *Inability to Market All Gas.* If at any time a Party's share of the gas available for sale exceeds the quantity of gas such Party's gas purchaser will take (excess gas), then every other Party, if requested to do so by the Party owning such excess gas, shall be obligated to share its market for gas with the Party owning such excess. However, if all excess gas cannot be sold, and the Plan of Depletion then in effect will not permit a reduction in the volume of gas produced, then any of such excess gas that must be reinjected or otherwise disposed of will be deemed to be the gas of all Parties such that all Parties will share ratably (in proportion to their ownership of the total volume of gas available for sale) in any deferral of sales or loss which might result from the reinjection or disposal of such excess gas and the costs thereof. The Parties sharing a market for excess gas shall settle their accounts for excess gas sold on a monthly basis. Sales of excess gas by a

> Party to other than that Party's gas purchaser shall be only for such reasonable periods of time as are consistent with the minimum needs of the industry under the circumstances, but not to exceed one year. Any such sale shall always be subject to the right of the owner of such excess gas to exercise at any time its right to take in kind, or separately dispose of, its share of such excess gas not previously delivered to a gas purchaser. A Party (hereafter called "Selling Party") who, pursuant to this Section 5.11, shall dispose of another Party's excess gas, shall dispose of such gas in accordance with the terms of the Selling Party's gas sales contract and the Party whose excess gas is being sold agrees to accept and be bound by all terms and conditions of such contract. Further, the Party whose excess gas is being sold agrees to indemnify, defend and hold harmless the Selling Party from all claims, demands, suits or causes of action which might arise by reason of such sale of such excess gas.

I Supp. App. of Appellees and Cross-Appellant (hereafter Amoco's Supp. App.) 189.

Before the AREU was discovered, Anschutz had entered into a long-term take-or-pay natural gas sales contract with Natural Gas Pipeline Company of America (NGPL). This contract encompassed the area in which the AREU was eventually found. Anschutz later assigned one-half of its interest in the AREU to Mobil Rocky Mountain, Inc. (Mobil), including a share of the contract with NGPL. Natural gas from the AREU was delivered to NGPL under the contract from June 1984 to May 1987. Because the price of natural gas plummeted during that period, NGPL curtailed its AREU gas purchases beginning in 1986, and both Anschutz and Mobil eventually sued NGPL for breach of the take-or-pay contract. Both suits were settled out of court.

Amoco and the smaller WIOs of the AREU did not enter into gas sales contracts during this period, nor did they sell their shares of gas from the AREU. In 1986 Amoco sued Anschutz, arguing that § 5.11 of the Unit Operating Agreement required Anschutz to share the proceeds of its sales to and settlement with NGPL with all the WIOs of the AREU. Anschultz filed a number of unrelated counterclaims, and the district court, after ruling on various pretrial motions, held a three-phase trial. In its pretrial order, the district court denied Anschutz's motions to dismiss for failure to join indispensable parties and for partial summary judgment.

In the Phase I trial, the district court ruled that § 5.11 required Anschutz to share the proceeds of its natural gas sales with the other WIOs, and rejected Anschutz's contentions that Amoco and the other WIOs had misrepresented to Anschutz that they would obtain separate gas purchasers for themselves. Phase II resolved issues of prejudgment interest, apportionment of Anschutz's settlement with NGPL among the WIOs, and the proper calculation of the WIOs' pro rata shares of Anschutz's gas sales proceeds. Finally, because Anschutz's counterclaims against Amoco were unrelated to the orignial claim, Phase III addressed them separately.

II

Anschutz raises two jurisdictional challenges, which we must resolve before considering the merits. First, it alleges that Amoco has its principal place of business in Colorado, and because Anschutz also has its principal place of business in that state, there is no diversity between them. Second, Anschutz argues that Amoco and the smaller WIOs agreed that the smaller WIOs, some based in Colorado, would not join the suit because to do so would destroy diversity, and that Amoco thereby violated the 28 U.S.C. § 1359 prohibition against the collusive manufacture of federal jurisdiction.

A

Under 28 U.S.C. § 1332(c)(1), for purposes of diversity jurisdiction "a corporation shall be deemed to be a citizen of any State by which it has been incorporated and of the State where it has its principal place of business." The party asserting jurisdiction, here Amoco, bears the burden of proving its existence once it is challenged. *Media Duplication Servs. v. HDG Software, Inc.*, 928 F.2d 1228, 1235 (1st Cir. 1991). Further, because the determination of a corporation's principal place of business is a question of fact, we review the district court's ruling under the clearly erroneous standard. *Id.* at 1237. This court has not considered the proper method for determining a corporation's principal place of business since 1966, *see United Nuclear Corp. v. Moki Oil & Rare Metals Co.*, 364 F.2d 568 (10th Cir.), *cert. denied*, 385 U.S. 960 (1966), so it is appropriate for us to analyze the various approaches courts have developed since that time for making this determination.

"[T]he courts of appeal now use three tests to determine a corporation's principal place of business: the 'nerve center' test, the 'corporate activities' test, and, most recently (and increasingly popular), the 'total activity' test." 13B Charles A. Wright et al., *Federal Practice and Procedure* § 3625, at 129 (2d ed. Supp. 1993). Under the "nerve center" approach, "a corporation has a single principal place of business where its executive headquarters are located." *Metropolitan Life Ins. Co. v. Estate of Cammon*, 929 F.2d 1220, 1223 (7th Cir. 1991). The "corporate activities" test (also known as the "place of operations" or "place of activities" test) "focuses on the state where a substantial portion of the corporation's business is located." *Danjag, S.A. v. Pathe Communications Corp.*, 979 F.2d 772, 776 (9th Cir. 1992). Finally, the "total activity" approach "considers a variety of factors, such as the location of the corporation's nerve center, administrative offices, production facilities, employees, etc.,

and it balances these factors in light of the facts of each case." *White v. Halstead Indus., Inc.*, 750 F. Supp. 395, 398 (E.D. Ark. 1990). The Seventh Circuit follows the nerve center test, *see Metropolitan Life*, 929 F.2d at 1223, whereas the Fifth and Eleventh Circuits have adopted the total activity test, *see Harris v. Black Clawson Co.*, 961 F.2d 547, 549 (5th Cir. 1992); *Vareka Invs., N.V. v. American Inv. Properties, Inc.*, 724 F.2d 907, 910 (11th Cir.), *cert. denied*, 469 U.S. 826 (1984). The Ninth and First Circuits use both the nerve center and corporate activities tests, and have developed methods for choosing which to use in a particular case. *See Danjag*, 979 F.2d at 776; *Topp v. CompAir, Inc.*, 814 F.2d 830, 834-35 (1st Cir. 1987).

In their treatise, Wright, Miller & Cooper maintain that the nerve center and corporate activities tests are two sides of the same coin, and that they "can be viewed as particular applications of the general rule that the bulk of corporate activity, as evidenced by the location of daily operating and management activities, governs the choice of a principal place of business." 13B Charles A. Wright et al., *Federal Practice and Procedure* § 3625, at 625 (2d ed. 1984). We agree, and therefore explicitly adopt what was implicit in *United Nuclear*, i.e., that the determination of a corporation's principal place of business does not hinge on one particular facet of corporate operations, but on the total activity of the company considered as a whole.[2] This totality of the circumstances approach avoids

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[2] In *United Nuclear*, we did not use any particular label to identify the method by which we would select the principal place of business. In two footnotes, we did cite to *Scot Typewriter Co. v. Underwood Corp.*, 170 F. Supp. 862 (S.D.N.Y. 1959), which is credited with developing the nerve center test. *See* 364 F.2d at 570 nn.8-9. However, the language we used in *United Nuclear* indicates that the entire circumstances of operation were to be considered:

> Where the corporation has its principal place of business is a question of fact to be determined by the character of the

the difficult choice betwen the two other tests, and also provides needed flexibility to address the myriad incarnations of corporate form and operations.

In its decision in Phase I, the district court found that Amoco has offices in Colorado and Illinois, that it is a subsidiary of Amoco Production Company (which is itself a subsidiary of Amoco Corporation), and that Amoco's entire *raison d'etre* is to manage Amoco Production's assets in the AREU. It also found that Amoco Production's office in Denver provides management and engineering services to Amoco under a management contract, principally through an office in Wyoming. Amoco's primary responsibility is the management of the AREU as unit operator.

The district court concluded that it need not definitively establish Amoco's principal place of business, but only determine that it was not in Colorado.[3] The district court

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corporation, its purposes, the kind of business in which it is engaged, and the situs of its operations.

Where a corporation carries on its business in a number of states, no one of which is clearly the state in which its business is principally conducted, the state where a substantial part of its business is transacted and from which centralized general supervision of all of its business is exercised, is the state in which it has its principal place of business.

Id. at 570 (quotation and footnote omitted). At least one district court in this circuit shares the view that *United Nuclear* endorsed the total activity test. *See Zimmerman Metals, Inc. v. United Eng'rs & Constructors, Inc.*, 720 F. Supp. 859, 861 (D. Colo. 1989). Therefore, our adoption of the total activity test does not require us to modify or overrule *United Nuclear*.

[3] Although the First Circuit appears to require the court to locate the principal place of business, *see Media Duplication Servs.*, 928 F.2d at 1236 ("In order to find diversity jurisdiction, a federal court must identify the principal place of business of a corporation, regardless of whether the corporation has ever made such

then applied the "center of activity" test, and determined that because all of Amoco's assets and production activities are in Utah and Wyoming, Amoco's principal place of business was in one of those states, not Colorado.

We have little difficulty upholding the district court's conclusion under the total activity test. The only connection between Amoco and Colorado is the management contract with Amoco Production. Amoco has no employees in Colorado. Amoco's sole function is to operate the AREU as unit operator and to manage Amoco Production's interest in the unit. Therefore, the locus of Amoco's total activities is the AREU, which spans two states, Wyoming and Utah. Anschutz is a Kansas corporation with its principal place of business in Colorado. There is complete diversity between the parties, and jurisdiction was proper in the district court.

B

Some of the nonparty WIOs are residents of Colorado for diversity purposes. Anschutz alleges that Amoco collusively agreed with other WIOs that none would join in this lawsuit who would destroy diversity. Under 28 U.S.C. § 1359, jurisdiction is nor appropriate when "any party, by assignment or otherwise, has been improperly or collusively made or joined to invoke the jurisdiction of [the

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an identification for itself."), we agree that such a finding is not always necessary.

> [A] party need not always prove the exact location of a corporation's principal place of business; all that is necessary is that he establish that diverse citizenship does or does not exist. If it can be shown, for example, that the principal place of business is one of two states, and the opposing party is not a citizen of either of them, jurisdiction will be upheld.

Wright, *supra*, § 3625, at 642 (footnote omitted). Diversity jurisdiction is premised upon the parties being from different states; which states those happen to be is not relevant if the party can be served, as long as it is clear that the possibilities do not include states that would destroy diversity.

district] court." This statute "is aimed at preventing parties from manufacturing diversity jurisdiction to inappropriately channel ordinary business litigation into the federal courts." *Yokeno v. Mafnas,* 973 F.2d 803, 809 (9th Cir. 1992). As with other challenges to jurisdiction, a party charged with creating jurisdiction by collusion bears the burden of demonstrating that jurisdiction is proper. 14 Wright, *supra,* § 3637, at 94.

Anschutz does not argue that Amoco is merely a "straw man" with no actual interest in the litigation. *See Martinez v. United States Olympic Committee,* 802 F.2d 1275, 1279 (10th Cir. 1986); *Hackney v. Newman Memorial Hosp.,* 621 F.2d 1069, 1071 (10th Cir.), *cert. denied,* 449 U.S. 982 (1980). Rather, its argument is based upon a litigation agreement between Amoco and the other WIOs, including those whose Colorado residency would destroy diversity if they joined in this suit. The agreement provides that Amoco and the others will share litigation expenses, recovery, and damage assessments from counterclaims in proportion to their interests in the AREU. Amoco promised to consult with the others on litigation strategy, but reserved to itself the final right of decision.

The litigation agreement does not constitute improper collusion under § 1359. The district court first determined that the other WIOs were not indispensable parties under Fed. R. Civ. P. 19(b), and Anschutz has not appealed that decision. Amoco is the unit operator who would normally conduct business, including litigation, on behalf of and for the benefit of the WIOs. The instant case is unusual only in that the suit is against another WIO, Anschutz. In such a case it is appropriate for the unit operator to secure consents for the litigation and agreement to bear the expense in proportion to their respective interests. There is no evidence that this contract was executed to help Amoco retain diversity jurisdiction. Because the joinder of the other WIOs was unnecessary, and because Amoco is an appropriate representa-

tive with a very substantial interest in the case, there is no improper collusion. *See Farrell Construction Co. v. Jefferson Parish, La.*, 896 F.2d 136, 143 (5th Cir. 1990) (prelitigation agreement between contractor and subcontractor specifying that contractor would sue adverse party on behalf of both of them held not to constitute improper collusion).

III

Turning to the merits of No. 92-8024, Anschutz raises several allegations of error. It argues that the district court erred (1) in determining that the first sentence of § 5.11 of the Unit Operating Agreement is ambiguous, (2) in refusing to interpret the first sentence to require a "gas purchaser," (3) in not applying a one-year limitation on market sharing found in the fourth sentence of § 5.11, (4) in admitting evidence of a settlement between Amoco and Mobil, and (5) in awarding prejudgment interest. We consider each contention in turn.

A

A federal court sitting in diversity must apply the conflict of laws rules of the state in which it sits. *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941). Wyoming law will give effect to an express choice of governing law by the parties. *Nelson v. McAdams, Roux & Assocs.*, 688 F. Supp. 1502, 1505 (D. Wyo. 1988). The parties agree that the Unit Agreement provides for the application of Colorado law to these disputes, and the district court did so with respect to § 5.11. We review de novo a district court's analysis and interpretation of state law. *Salve Regina College v. Russell*, 111 S. Ct. 1217, 1221 (1991).

Under Colorado law, "[i]nterpretation of a written contract and whether ambiguity exists is a question of law for the court." *Colorado Interstate Gas Co. v. Chemco, Inc.*, 833 P.2d 786, 788 (Colo. Ct. App. 1991), *aff'd*, No. 92SC163, 1993 WL 199081 (Colo. June 14, 1993); *see also Smalley & Co. v. Emerson & Cuming, Inc.*, 808

F. Supp. 1503, 1514 (D. Colo. 1992) (construing Colorado law). If a contract is determined to be ambiguous, however, "the meaning of terms is generally an issue of fact to be determined in the same manner as other disputed factual issues. Findings of fact made by the trial court are binding on appeal if supported by evidence in the record." *Colorado Interstate Gas*, 833 P.2d at 789 (citation omitted).

"The meaning of a contract is found by examination of the entire instrument and not by viewing clauses or phrases in isolation. Each *word* is to be given meaning if at all possible." *United States Fidelity & Guar. Co. v. Budget Rent-A-Car Sys., Inc.*, 842 P.2d 208, 213 (Colo. 1992) (citation omitted). The intent of the parties must be determined from the language of the contract itself, *In re Marriage of Thomason*, 802 P.2d 1189, 1190 (Colo. Ct. App. 1990), although "a court may consider extrinsic evidence bearing upon the meaning of the written terms, such as evidence of local usage and the circumstances surrounding the making of the contract." *Colorado Interstate Gas*, 833 P.2d at 789. Extrinsic evidence of intent is not admissible until the contract has been judged to be ambiguous. *Thomason*, 802 P.2d at 1190. "To ascertain whether a provision is ambiguous, the court must examine and construe the language in harmony with the plain, popular, and generally accepted meaning of the words employed and with reference to all provisions of the document." *Wota v. Blue Cross & Blue Shield*, 831 P.2d 1307, 1309 (Colo. 1992) (quotations omitted). The nature of the transaction forming the subject matter of the contract is also considered. *Thomason*, 802 P.2d at 1190. A dispute between the parties as to the meaning of a particualr provision does not itself render the provision ambiguous. *Wota*, 831 P.2d at 1309.

We must determine whether § 5.11, and initially the first sentence thereof, is ambiguous. The first sentence reads:

> If at any time a Party's share of the gas available for sale exceeds the quantity of gas such Party's gas purchaser will take (excess gas), then every other Party, if requested to do so by the Party owning such excess gas, shall be obligated to share its market for gas with the Party owning such excess.

I Amoco's Supp. App. 189. Anschutz maintains that each WIO must have had a "gas purchaser" before this provision could be invoked; that § 5.11 was to go into effect only when one party's purchaser could not take all of that party's gas and another party's purchaser would take that excess. Although this is a reasonable interpretation, we cannot conclude that this sentence unambiguously requires each WIO to have a gas purchaser. Amoco's equally plausible interpretation is that if a WIO has gas available but no buyer, that owner may invoke § 5.11 to make those WIOs who do have a market share it. Nowhere else in the contract is a requirement for a gas purchaser mentioned, so reference to other provisions is unhelpful in this regard. Applying the "plain, popular, and generally accepted meaning of the words employed," *Wota,* 831 P.2d at 1309, we agree with the district court that the first sentence of § 5.11 is ambiguous as a matter of law with respect to the requirement of a gas purchaser.

B

"Once the contract is determined to be ambiguous, it must be construed in accordance with the intent of the parties, and relevant evidence may be considered to resolve factual questions of the parties' intent." *Colorado Interstate Gas,* 833 P.2d at 789. The district court made extensive findings of fact as to the parties' interpretations of § 5.11, and, under Colorado law, we must accept these findings unless they are clearly erroneous. *Id.*

In arriving at its conclusion, the district court recited, *inter alia,* the following: An Anschutz attorney testified that the working interest owners never addressed the issue

of excess gas because they did not expect there to be any. App. of Defendant-Appellant the Anschutz Corp. (hereafter Anschutz's App.) 178. Representatives of Amoco and Champlin testified to their understanding that the section provided for market sharing. *Id.* at 179. Two Anschutz vice presidents testified that their understanding was that each party would have a purchaser. *Id.* at 179-80. Representatives of the smaller WIOs testified that they would not have entered into the agreement if a gas purchaser was required. *Id.* at 180. At one point in 1985 Anschutz proposed making a payment to Amoco for distribution to the WIOs, but withdrew the proposal three months later. *Id.* at 181. Also in 1985, Amoco considered sharing in Anschutz's contract as an alternative marketing strategy. *Id.* at 183. There was general agreement during contract negotiations that the WIOs agreed to reject the use of an in kind or volumetric balancing system to resolving imbalances in the amount of gas taken by the various WIOs because the nature of the field required nitrogen injection that would decrease the quality of the gas and over time would increase the costs of processing the gas. *Id.* at 192. The district court also recited the minutes of the 42nd meeting of the WIOs in which § 5.11 was discussed, and to which Anschutz did not object, which stated that "new Section 5.11 provides that those parties who don't have a gas market will share proportionately in the market that is available." I Amoco's Supp. App. 222; I Anschutz's App. 178.

Based on this evidence, the district court concluded that

> the reference to "gas purchaser" used in § 5.11 was simply a reference point, and not a prerequiste to market sharing. The testimony and evidence presented to the Court compels the conclusion that the mutual intention of the parties was to share pro rata in any gas market available, regardless of whether a WIO had ever had a gas purchaser.

Id. at 192-93. The court noted that virtually all of the testimony presented was self-serving, but in addition to the minutes of the 42nd meeting of the WIOs, it relied more heavily on the testimony of the smaller WIOs, who had a lesser stake in the outcome. Anschutz contends that because the district court also found that the smaller WIOs initially intended to have their own gas purchasers, the court's reliance on testimony by the same individuals concerning the gas purchaser requirement was misplaced. We believe it is not inconsistent for the smaller WIOs to have originally intended to obtain gas purchasers, but to be reluctant to sign an agreement requiring them to do so.

Based on our review of the record, we cannot find clearly erroneous the district court's conclusion that the intent of the parties, to the extent it can be ascertained at all, was that they were not required to have a gas purchaser before invoking the market sharing provisions of § 5.11.

C

The fourth sentence of § 5.11 reads as follows: "Sales of excess gas by a Party to other than that Party's gas purchaser shall be only for such reasonable periods of time as are consistent with the minimum needs of the industry under the cirmumstances, but not to exceed one year." I Amoco's Supp. App. 189. Anschutz argues that this sentence limits any market sharing required by the first sentence to one year. The district court disagreed, ruling that it was boilerplate language inserted solely as an income tax precaution, and did not have any substantive effect on the parties' agreement.

We agree with Anschutz that the mere fact that contract language is "boilerplate" does not render it without effect. *Adams v. Merrill Lynch Pierce Fenner & Smith,* 888 F.2d 696, 701 (10th Cir. 1989). Further, as noted earlier, we examine the contract language as a whole before considering extrinsic evidence of intent. As with the

first sentence of § 5.11, this clause is ambiguous. If a party sells gas to someone, the entity buying the gas is the party's "gas purchaser," so it is impossible for "a party" to sell excess gas to someone other than its gas purchaser. We agree with the district court that the only reasonable construction of the sentence is this: Sales of a WIO's excess gas by another WIO to the selling WIO's gas purchaser shall be only for such reasonable periods of time as are consistent with the minimum needs of the industry under the circumstances, but not to exceed one year.[4] I Anschutz's App. 218, 225.

This then brings us to Anschutz's argument, that the sharing required by the first sentence should extend only for one year. We believe that, taken as a whole, the limitation's purpose is to restrict the right of a selling party to sell the gas of a non-producing party, thereby limiting the control one party could exert over the other. This is consistent with the uncontradicted testimony by various witnesses that the sentence was inserted so that the market sharing provisions would not result in the unit being taxed as a corporation. Under the Internal Revenue Code, the unit could be taxed as a corporation if the smaller WIOs ceded irrevocable authority to a larger owner or to the unit operator to market their gas. The smaller WIOs would then be more like shareholders than partners. *See Morrissey v. Commissioner*, 296 U.S. 344 (1935). A smaller WIO's choice to have its gas sold under the excess market sharing provisions is not affected by the one year limitation.

D

Anschutz objected at trial to the admission of a settlement agreement between Mobil and Amoco. Because Mobil had purchased an interest in the AREU from Anschutz, as well as part of the NGPL contract, Amoco

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[4] All parties admit that the phrase "only for such reasonable periods of time as are consistent with the minimum needs of the industry under the circumstances" is devoid of discernible meaning.

sought the same market sharing benefits from Mobil as it now does from Anschutz. Amoco and Mobil settled out-of-court, and Amoco offered the settlement agreement as evidence in the suit against Anschutz. Anschutz's objection was overruled, and it now contends that the settlement agreement was irrelevant and should not have been admitted.

The decision to admit or exclude evidence is within the discretion of the district court, and will not be reversed absent an abuse of that discretion. *Hinds v. General Motors Corp.*, 988 F.2d 1039, 1048 (10th Cir. 1993). As defined by Fed. R. Evid. 401, relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." This threshold is low, and we have no difficulty concluding that the Mobil-Amoco settlement agreement reaches it.

Although the agreement specified that Mobil was uncertain about the application and interpretation of § 5.11, Mobil paid Amoco a sum consistent with Amoco's interpretation of that section. Mobil and Anschutz were identically situated with regard to the market sharing provisions of § 5.11, and Mobil's conduct is relevant in determining the meaning of that section. Anschutz contends that the district court relied too heavily on the settlement agreement in various parts of the case, thereby tipping the scales in Amoco's favor. These arguments go to the weight to be given the evidence, not its admissibility, and such inquiries are solely within the purview of the trier of fact. We will not second-guess the district court's evaluation of the evidence properly before it.

E

The district court ruled that, because Colorado substantive law was applicable to the case, it would follow Colorado choice of law rules on prejudgment interest.

Those rules require the rendering court to apply the prejudgment interest law of the forum state; so the district court applied Wyoming law to the availability and calculation of prejudgment interest. Anschutz contends that under Wyoming law prejudgment interest should not have been available. Amoco disputes this interpretation of Wyoming law, but initially argues that Colorado law, not Wyoming law, should have been applied to this determination.

Wyoming follows the *Restatement (Second) of Conflict of Laws* on contract issues. *See Cherry Creek Dodge, Inc. v. Carter*, 733 P.2d 1024, 1027 (Wyo. 1987); *Prehoda v. Edward Hines Lumber Co.*, 399 F. Supp. 643, 646 (D. Wyo. 1975). Section 207 of the Second Restatement states that "[t]he measure of recovery for a breach of contract is determined by the local law of the state selected by application of the rules of §§ 187-188." Here, because the parties selected Colorado law in their contract, § 187 dictates that Colorado law applies. Comment e to § 207 instructs that "[t]he local law of the state selected by application of the rule of this Section determines whether plaintiff can recover interest, and, if so, the rate, upon damages awarded him for the period between the breach of contract and the rendition of judgment." Thus, because § 207 selects Colorado, that state's law of prejudgment interest applies to this case. The district court erred by applying the *whole* law of Colorado, including its conflict rules, rather than just the substantive Colorado law of prejudgment interest. This maneuver, known as a *renvoi*, is appropriate only in limited circumstances not present here. *See Restatement (Second) of Conflict of Laws* § 8(2) & (3) (1971). Thus we must remand this aspect of the case for the district court to reconsider the availability and, if applicable, the calculation of prejudgment interest under Colorado law.

IV

Upon being sued by Amoco for breach of § 5.11 of the Unit Operating Agreement, Anschutz filed a number of unrelated counterclaims. The district court found in favor of Anschutz on four of them and ordered Amoco to pay $4,940,585.03. In No. 92-8027, Amoco now appeals these rulings.

A

In 1985 NGPL sought a declaratory judgment absolving it from liability under its long-term take-or-pay contract with Anschutz. As a result, Anschutz hired law firms in Denver and Chicago and counterclaimed for breach of contract. The ensuing discovery and motion practice lasted three and one-half years. In association with the suit, Anschutz incurred $3.6 million in attorneys' fees. The district court found, and Amoco does not dispute, that Anschutz's in-house counsel regularly reviewed the monthly billings of the law firms and found the charges to be reasonable and necessary. The suit was settled in 1988 with Anschutz receiving $46 million, offset by approximately $28.5 million in debts due NGPL by Anschutz, for a net cash recovery of $17.5 million.

Under the final sentence of § 5.11 of the Unit Operating Agreement, "the Party whose excess gas is being sold agrees to indemnify, defend and hold harmless the Selling Party from all claims, demands, suits or causes of action which might arise by reason of such sale of such excess gas." The district court found that Anschutz notified Amoco of its potential indemnification obligation with respect to the NGPL litigation no later than December 1986, when Anschutz filed its counterclaims against NGPL. The court also found that of the $46 million recovered from NGPL, $17,753,433.99 represented proceeds from gas delivered to NGPL and subject to market sharing under § 5.11. This constituted 38.59% of the total recovery from NGPL, so the district court awarded Anschutz the same percentage of its fees

under the indemnification clause, resulting in a $1,389,240 assessment against Amoco.

Under Colorado law, "an indemnity agreement is subject to the same rules of construction which govern contracts generally. Hence, it should be enforced according to the plain and generally accepted meaning of its language and interpreted in its entirety to give effect to all of its provisions so none are rendered meaningless." *May Dep't Stores Co. v. Unversity Hills, Inc.*, 824 P.2d 100, 101 (Colo. Ct. App. 1991); *see also Omnibank Parker Road, N.A. v. Employers Ins.*, 961 F.2d 1521, 1523 (10th Cir. 1992). Regarding the proper calculation of the fee award, "[a]n award of attorneys' fees typically represents a finding of fact subject to review for clear error." *United States v. Hardage*, 985 F.2d 1427, 1436 (10th Cir. 1993).

Apparently unable to separate out the exact portion of the legal fees and expenses attributable to the sales of gas subject to § 5.11, the court awarded fees based on the percentage of the recovery attributable to excess gas. We cannot hold that was error, or that the evidence of reasonableness of the fees the attorneys charged was deficient. Thus we affirm the court's holding that "Anshutz may recover its attorneys' fees in the same pro-rata portion which it was required to share its settlement." I Anschutz's App. 268.

The district court went on to calculate the recovery as $1,389,240. *Id.* Amoco argues that the district court miscalculated the correct percentage. In its opening brief it states that this is because the share of the NGPL recovery received by Amoco was approximately $10,652,060, or 23.16% of the total recovery. In its reply brief Amoco states that the $10 million plus figure is in error and Amoco received only $8,365,386.89, or 18.19% of the total recovery. It argues that a proper application of the district court's formula would produce

a different figure than the amount awarded to Anschutz. We do not understand how Amoco arrived at either its initial or revised figure; and considering Anschutz's percentage ownership both figures seem suspect. But we receive no enlightenment on this point from Anschutz either, which merely defends the calculations as "not clearly erroneous." Reply Brief of Appellant and Answer Brief of Cross-Appellee at 31. We confess to difficulty understanding the mathematics applied by the court in calculating the gas subject to § 5.11, although the parties appear to undersand it, and Anschutz did not appeal the calculation (as opposed to whether § 5.11 applied at all) that produced the $29,324,113.31 damages involved in appeal No. 92-8024.[5] Because the case must

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[5] Our confusion arises from the way the court and parties reference "excess gas" under § 5.11. The district court stated in its Phase I order that "[d]uring the period between unitization (December 1, 1982) and the filing of this suit (June 5, 1986), Anschutz sold no more than its working interest owner's share of gas available for sale." I Anschutz's App. 177; but it found "that the mutual intention of the parties was to share pro rata in any gas market available." *Id.* at 192. In its Phase II order the court stated that

> non-selling WIOs are entitled to market sharing if and when a selling WIO has available to it a purchaser which will take more than that selling WIO's share of gas. A market is not *available* to be shared under section 5.11 unless and until a gas purchaser is willing to buy more than the selling WIO's share of gas.

Id. at 213. In calculating the amount owed to Amoco under § 5.11, the district court apparently adopted Amoco's "entitlements model." Pl.'s ex. 25, III Amoco's Supp. App. 760. That exhibit is nothing more than a summary, however, and does not provide enough information for us to determine how the calculations were performed. Amoco also has made confusing characterizations as illustrated by the following sentences on consecutive pages of its answer brief: "Under § 5.11, if a WIO sells an amount of gas in excess of its share of the gas sold in that month ('excess gas'), it must share the revenues received for the excess gas with any WIOs selling less than their share of the month's gas sales." Answer Brief of Appellees and Opening Brief of Cross-Appellant at 4.

be remanded on the prejudgment interest issue, we direct the district court to re-review its math on this attorney fee sharing calculation. In all other respects we affirm its determination. We also agree with Anschutz that Amoco is not entitled to indemnification as an offset to its liability on this counterclaim. Amoco's claim, based upon the instant suit against Anschutz, has no relationship to Anschutz's claim for sharing the costs of its NGPL litigation.

B

Under the Unit Operating Agreement, Amoco served as the Unit Operator for the AREU, in charge of the day-to-day operations of the field. In May 1986, the WIOs were concerned about the high gas-to-oil ratio in some of the wells, and a subcommittee debated a number of ways to address the problem. Amoco favored workovers on the problem wells, although previous workovers had been ineffective. The rest of the subcommittee, however, preferred to address the problems on a case-by-case basis. In early June, Amoco notified Anschutz that June production would be 38,000 barrels per day, rather than the 45,000 per day Amoco had previously forecasted, and that in the meantime Amoco was preparing a package of workouts and conversions for the WIOs' consideration. Amoco unilaterally instituted this "change in mode" of operations without prior notice to the WIOs, and later informed them that the original production rates would be restored if they agreed to Amoco's workover proposal, which would cost $12.3 million. The other WIOs evenually agreed, and production levels were restored in July.

In its counterclaim, Anschutz argued that Amoco violated the provisions of the Unit Operating Agreement by its action, and sought damages based on the reduced production levels for June. The district court agreed, and

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"Under § 5.11, all AREU gas was 'family' gas, and each WIO would share in the revenues derived from gas sales, regardless of which WIO actually sold gas." *Id.* at 5 (citation omitted).

awarded Anschutz $475,326 plus interest. Amoco contends on appeal that the district court applied the wrong standard for unit operator liability, that in any event its conduct did not violate the Unit Operating Agreement, and that Anschutz failed to establish its damages from the reduced production in June.

Under § 15.1.1, the Unit Operator may not "[m]ake any substantial change in the basic method of operation of the Plant, any well or any Unit facility, except in the case of an emergency," without the approval of the WIOs. I Amoco's Supp. App. 205. Amoco's first argument is that the Unit Operating Agreement provides for an enhanced standard before liability attaches to the Unit Operator. Section 13.3 states:

> The Unit Operator shall conduct all operations hereunder in a good and workmanlike manner and in accordance with prudent operating practices but the Unit Operator shall not be liable to the Parties for any losses, costs or expenses resulting from any act or omission on the part of the Unit Operator, its agents or employees, save and except such losses, costs or expenses which shall result from the gross negligence or willful misconduct of the Unit Operator, its agents or employees.

Id. at 202-03. Amoco misconstrues the purpose and effect of this clause.

Parties to a contract may agree to insulate one or more parties from liability for harm caused by ordinary negligence in the performance of a contractual duty, but such an agreement absolving a party from liability for willful or grossly negligent acts is void as against public policy. 6A Arthur L. Corbin, *Corbin on Contracts* § 1472, at 596-97 (1962). Even when exemption from liability for negligence is not illegal, however, exculpatory clauses are strictly construed. *Id.* at 602. "Colorado adheres to the general rule that parties cannot contract away their own negligence." *ANR Production Co. v. Westburne Drilling,*

Inc., 581 F. Supp. 542, 547 (D. Colo. 1984). But Colorado law will uphold an exculpatory agreement if there is no duty to the public, the contract was fairly entered into, and the intention is clearly expressed, depending upon "the nature of the service performed." *Jones v. Dressel*, 623 P.2d 370, 376 (Colo. 1981). We would have no trouble upholding the application of § 13.3 if this case involved tortious acts related to the performance of the contract, such as an error in dealing with a third party that caused loss to the whole operation. But the issues in the instant counterclaim, and in the two other counterclaims to which Amoco seeks to apply the clause, relate to actions taken deliberately and, as the district court found, in breach of the contract involving shifting costs between the contracting WIOs. Applying strict construction we do not believe the exculpatory language applies to these counterclaims. The breaches at issue here are nonperformance of duties imposed by the contract, and do not hinge on whether the breaching party's failure to perform was negligent, grossly negligent, or willful. Here, Anschutz alleges that Amoco unilaterally and intentionally instituted a "substantial change" in unit operations by reducing production, thereby violating § 15.1.1 and breaching the contract. The district court, aware of but not citing § 13.3, apparently held that section is not implicated; we agree.

Amoco argues that its production level decision did not represent a "substantial change in the basic method of operation" of the field requiring WIO approval. The facts found by the district court belie this contention. In the participating area involved, seventeen of the twenty-four wells were affected by Amoco's decision. Further, the Unit Operating Agreement strictly limits the discretion of the Unit Operator. Section 14.1.3 requires the Unit Operator to consult with the other WIOs and to keep them apprised of all important matters, but Amoco never informed these WIOs of its intentions to reduce production, even though it was considering such action

two months before it occurred. Under the circumstances, we agree with the district court that Amoco breached § 15.1.1 by reducing production without approval of the other WIOs.

Amoco next contends that even if a breach occurred, Anschutz could not prove its damages. It argues that because the unproduced oil and gas remains in the reservoir, Anschutz will receive a windfall if it is awarded damages now and gets its share of the oil and gas when it is eventually removed. However, the West Participating Area (WPA) of the AREU is volatile, and the extent of eventual recovery from it is highly speculative. Anschutz has established exactly how much it lost because of the reduced production, and its inability to forecast future recovery from the WPA does not bar a damage award. "Although an award of damages cannot be based on mere speculation or conjecture, once the fact of damage has been established with the requisite degree of certainty, uncertainty as to the amount of damages will not bar recovery." *Tull v. Gundersons, Inc.*, 709 P.2d 940, 943 (Colo. 1985).

C

Gas produced from the AREU and consumed on the premises for operations is known as "fuel gas." As Unit Operator, Amoco had the responsibility for accounting for the fuel gas consumed and for allocating charges and credits to the WIOs. Before 1986, charges for fuel gas were allocated on a participation basis, but credits for gas consumed were allocated based on production from the various participating areas. This method resulted in Anschutz paying for fuel gas rather than contributing fuel gas in kind. After Anschutz discovered this accounting procedure, Amoco agreed to modify it to allocate both credits and charges based on participation, but refused to apply the modification retroactively. Anschutz argued, and the district court agreed, that Amoco's method breached the contract by not permitting

Anschutz to contribute its share of fuel gas in kind, rather than paying for its acquisition from other WIOs. Amoco contends that this ruling disregarded the vote of the WIOs not to apply the accounting change retroactively.

Section 5.6 of the Unit Operating Agreement provides that charges and costs relating to unit operations are apportioned based on either participation or ownership, depending on the situation. Nothing in the agreement provides for the proper allocation of fuel gas credits. However, § 7.2.1 of the Unit Agreement allows the WIOs to contribute fuel gas in kind, and Amoco's accounting method effectively prevented Anschutz from doing so. We agree with the district court that for a party to avail itself of the in-kind option of § 7.2.1, an accounting method that apportions fuel gas credits on a participation or ownership basis is required, and Amoco's failure to use such a method constituted a breach of contract.[6] Amoco's contention that the WIOs voted not to apply the accounting modification retroactively is of no moment; such action does not absolve Amoco of liability for its breach of the contract.

D

In 1986 Anschutz sought to construct a truck loading facility at the AREU so it could take advantage of higher sales prices in Salt Lake City; the existing pipeline to Salt Lake City did not have sufficient capacity to carry all the AREU oil. Amoco owned the existing pipeline, so Anschutz planned to construct its own pipeline and use the truck loading facility until its pipeline was completed. Under § 5.9 of the Unit Operating Agreement, each WIO had the responsibility for disposing of its

[6] As with Anschutz's claim for the unilateral change in operations, Amoco argues that § 13.3's heightened standard for Unit Operator liability is applicable. This claim by Anschutz is based upon a breach of the contract, however, and our analysis in Part IV-B above controls.

share of production, and for paying the Unit Operator for any costs incurred during disposal. Consequently, on October 7, 1986, Anschutz requested Amoco to build, at Anschutz's expense, the truck loading facility. Amoco does not contest its responsibility to act on this request.

Despite Anschutz's request for expeditious consideration, Amoco did not formally respond until December 15, and then only to express concerns over a number of aspects of the proposal. Because of protracted negotiations between the parties, the truck loading facility agreement was not executed until September 18, 1987. By that time Anschutz's pipeline was nearing completion, so Anschutz chose not to go forward with the truck facility. In its counterclaim, Anschutz sought damages from Amoco based upon the increased costs its incurred during 1987 to transfer oil from the AREU to Salt Lake City in the absence of the truck loading facility. The district court found that Amoco understood that construction of the facility would deprive it of revenue, that it deliberately delayed the approval, and the court ruled that Amoco did not act in good faith in its consideration of the proposal. The court also found that the facility would have been completed by January 1987 if Amoco had acted promptly, and therefore assessed damages against Amoco for Anschutz's increased cost, less the cost of operating the facility had it been in existence from January to September 1987.

Under Colorado law, "[e]very contract contains an implied duty of good faith and fair dealing." *Wheeler v. Reese,* 835 P.2d 572, 578 (Colo. Ct. App. 1992), *cert. denied* (Colo. Aug. 31, 1992). The evidence supports the district court's finding that Amoco knew of the economic repercussions of construction of the facility, and its delays were related to those concerns. Further, had Amoco acted promptly, the facility could have been built during the fall construction season and would have been

operational in January 1987. Therefore, the district court's ruling as to liability was correct and its calculation of damages was not clearly erroneous.

E

Amoco argues that Colorado, not Wyoming, law applies to the issue of prejudgment interest. We agree. We set out our reasoning in Part III-E above. The same analysis applies to the damage awards we affirm with respect to the cross-appeal. All were based on breach of a contract that specified Colorado law should govern. Thus, we remand on this issue for the district court to reconsider the availability and, if applicable, the rate of prejudgment interest under the law of Colorado.

The judgment of the district court is AFFIRMED except with respect to the prejudgment interest issues. On remand the court is also directed to re-examine its calculation of the sharing of attorneys' fees and costs with respect to the NGPL litigation.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

No. C86-0172-B

AMOCO ROCMOUNT COMPANY, a Delaware corporation, as Unit Operator of, and as an individual interest owner in, the Anschutz Ranch East Unit, and CHAMPLIN PETROLEUM COMPANY, a Delaware corporation, as an individual interest owner in the Anschutz Ranch East Unit,

Plaintiffs,

vs.

THE ANSCHUTZ CORPORATION, a Kansas corporation,

Defendant and Third Party Plaintiff,

vs.

JERRY D. ARMSTRONG, J.H. BANDER, RAY O. BROWNLIE, JAMES B. WALLACE, BWAB, INC., CHEVRON, U.S.A., INC., MESA PETROLEUM COMPANY, MTS LIMITED PARTNERSHIP, MOBIL ROCKY MOUNTAIN, INC., PAN CANADIAN PETROLEUM, INC.,

Third Party Defendants.

[Filed July 30, 1990]

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

This matter was presented in a trial to the Court on December 5-7 and 14-16, 1988, and August 30, 1989.

The Court, having heard the testimony of the witnesses, having considered the other evidence presented, having heard and considered the legal arguments of counsel, having reviewed the materials on file, and being fully advised in the premises, now makes the following findings of fact and conclusions of law:

BACKGROUND

This action is a contract dispute arising from the interpretation of one sentence of § 5.11 of the Unit Operating Agreement (Ex. 2)[1] entered into by the parties November 22, 1982. The opposing interpretations translate to a difference in excess of twenty-three million dollars ($23,000,000.00), which goes some way towards explaining the thorough presentation and ardent advocacy of the parties.

The Unit Operating Agreement was intended to govern the allocation of funds derived from the sale of the gas produced from the Anschutz Ranch East Unit ("AREU"), a vast oil and gas field straddling the Utah-Wyoming border. All parties in this suit are or were working interest owners ("WIO") of this field. As such, they are entitled to varying shares in the oil and gas from the AREU.

The reservoir underlying the AREU is a retrograde condensate reservior, consisting of hydrocarbon-rich fluid under extreme heat and pressure. The reservior is divided into two lobes, or "participating areas." The West Participating Area ("WPA"), located primarily in Utah, contains the majority of the reserves. The East Participating Area ("EPA"), located primarily in Wyoming, contains a fraction of the reserves. When brought to the surface, three types of hydrocarbons are recoverable: con-

[1] Plaintiffs and defendant made a joint submission of exhibits, which are referred to by number. Other exhibits will be identified by referral to the parties submitting them (i.e., "Defendant's ex. 1).

densate, or oil; natural gas liquids (propane and butane); and natural gas. The latter is at issue in this suit.

Soon after the 1979 discovery of the AREU, it was determined that the fluid in the reservoir was near the point of condensation, which would greatly reduce recovery. In an effort to maximize recovery of the reserves, in October 1980, the WIOs began formal negotiations regarding unitization, or pooling, of the field. Those negotiations culminated in the Unit Agreement and Unit Operating Agreements executed by the WIOs November 22, 1982.

Section 5.11 of the Unit Operating Agreement reads:

> 5.11 Inability to Market All Gas. If at any time a Party's share of the gas available for sale exceeds the quantity of gas such Party's gas purchaser will take (excess gas), then every other Party, if requested to do so by the Party owning such excess gas, shall be obligated to share its market for gas with the Party owning such excess. However, if all excess gas cannot be sold, and the Plan of Depletion then in effect will not permit a reduction in the volume of gas produced, then any of such excess gas that must be reinjected or otherwise disposed of will be deemed to be the gas of all Parties such that all Parties will share ratably (in proportion to their ownership of the total volume of gas available for sale) in any deferral of sales or loss which might result from the reinjection or disposal of such excess gas and the costs thereof. The Parties sharing a market for excess gas shall settle their accounts for excess gas sold on a monthly basis. Sales of excess gas by a Party to other than that Party's gas purchaser shall be only for such reasonable periods of time as are consistent with the minimum needs of the industry under the circumstances, but not to exceed one year. Any such sale shall always be subject to the right of the owner

> of such excess gas to exercise at any time its right to take in kind, or separately dispose of, its share of such excess gas not previously delivered to a gas purchaser. A Party (hereafter called "Selling Party") who, pursuant to this Section 5.11, shall dispose of another Party's excess gas, shall dispose of such gas in accordance with the terms of the Selling Party's gas sales contract and the Party whose excess gas is being sold agrees to accept and be bound by all terms and conditions of such contract. Further, the Party whose excess gas is being sold agrees to indemnify, defend and hold harmless the Selling Party from all claims, demands, suits or causes of action which might arise by reason of such sale of such excess gas.

Section 5.11 closely follows § 5.9, entitled "Taking in Kind," which provides that "Each Party shall currently, as produced, take in kind or separately dispose of its share of Allocable Unitized Substances."

Plaintiffs now argue that § 5.11 provides that each WIO is entitled to its pro rata share in all gas sold from the AREU. Defendant argues that § 5.11 was drafted for the limited purpose of providing a method for short-term cash balancing that would go into effect only when one party's purchaser was unable to take all of that party's gas, and another party was able to dispose of the excess gas by selling it to its purchaser under its contract. Defendant argues § 5.11 is not operative because plaintiffs did not have the prerequisite purchasers, did not make the required request that Anschutz sell plaintiffs' share of the gas produced, and because Anschutz never sold any more than its own working interest share of the gas available.

HISTORY OF THE CASE

Plaintiffs Amoco and Champlin filed their complaint against Anschutz June 5, 1986, alleging that the gas sold by Anschutz to NGPL included gas owned by the plain-

tiffs and other working interest owners, and that Anschutz had refused to pay or account for their share of the gas sold. Amoco brought suit as an individual WIO and as unit operator. Amoco and Champlin seek damages in the amount of their pro rata shares of gas sold by Anschutz, cash balancing and an accounting.

Anschutz filed a motion to dismiss the action for failure to join indispensable parties, pursuant to Fed. R. Civ. P. 19. The Court issued an order denying the motion November 23, 1988. The Court held that it could grant complete relief to the persons already parties, and that any claims of the absent WIOs against Anschutz were separate and distinct from the claims of plaintiffs in the instant suit. The Court also denied Anschutz's summary judgment motion on the issue of whether § 5.11 required that a party have a gas purchaser before its market sharing provisions would go into effect. (November 23, 1988 Order on Motions).

Anschutz generally denied liability in its answer, and raised ten (10) affirmative defenses and thirty-one (31) counterclaims. The Court granted a motion to bifurcate trial of the complaint and counts 1, 2, 30 and 31 of the counterclaim from counts 3 through 29 of the counterclaim. Thus, the issues for resolution before this Court are plaintiffs' action for damages and an accounting; defendant's counterclaim against Amoco and Champlin alleging that they misrepresented a material fact when they represented that they would have a gas purchaser (Count 1); defendant's counterclaim for judgment declaring that § 5.11 is void and unenforceable because of the material misrepresentation by the other signatories to the Unit Operating Agreement (Count 2); and defendant's counterclaim for declaratory judgment regarding the meaning and operation of § 5.11 (Count 30).

FINDINGS OF FACT

In the late 1960's and 1970's a natural gas shortage resulted in increased gas prices. In 1978, Congress enacted the Natural Gas Policy Act (NGPA), 15 U.S.C.

§§ 3301-4342. The NGPA provided for gradual deregulation of natural gas prices until January 1, 1985, when major deregulation would take effect. As a result of NGPA incentives, the natural gas supply increased in the early 1980's, just as the demand for it was decreasing. *See State of Ill. Ex. Re. Hartigan v. Panhandle Eastern Pipe Line Co.*, 730 F.Supp. 826, 836-37 (C.D.Ill. 1990).

The average wellhead gas price in Wyoming and Utah in 1980 was $1.78 per one thousand (1,000) cubic feet ("mcf"); in 1981 it had risen to $2.47; in 1982 it had reached $3.19. The price continued to rise, to a high of $3.41 in early 1984. In mid-1984, the price of gas began to drop, and it plummeted when gas was deregulated in January, 1985. By 1986 the average wellhead gas price in Wyoming and Utah was $2.59 per mcf. (Defendant's ex. B5).

Section 5.11 of the Unit Operating Agreement, the provision at issue here, was negotiated during the 42nd Working Interest Owners Meeting October 14, 15 and 19, 1982, and executed November 22 of that year.

Plaintiff Amoco Rocmount Company ("Amoco") is a corporation formed under the laws of the state of Delaware, with offices in Colorado and Illinois. Amoco is a subsidiary of Amoco Production Company ("Amoco Production"), which is in turn a subsidiary of Amoco Corporation. Amoco Rocmount's function is to manage Amoco Production's assets in the AREU. One of Amoco Production's several offices is in Denver, Colorado, and that office provides some management and engineering services to Amoco under a management contract, primarily through its Evanston, Wyoming office. Operational strategy decisions are made primarily at the Chicago, Illinois office. Amoco was and is the unit operator of the AREU, (Ex. 1, Unit Agreement, § 4). As such, it is responsible for unit management. (Ex. 2, Unit Operating Agreement, Articles 13 and 14).

Plaintiff Champlin Petroleum Company ("Champlin"), now known as Union Pacific Resources Company, is a Delaware corporation.

Defendant The Anschutz Corporation ("Anschutz") is a corporation formed under the laws of the State of Kansas, with its principal place of business in Colorado.

Third-party defendants Jerry D. Armstrong, J.H. Bander, Ray O. Brownlie, Gulf Oil Corporation, Mesa Petroleum Corporation, MTS Limited Partnership and James B. Wallace were also WIOs and parties to the Unit Agreement and Unit Operating Agreement executed November 22, 1982.

On or about June 5, 1986, third-party defendants Pan Canadian Petroleum, Inc. and Chevron U.S.A., Inc. were WIOs as successors in interest to some signatory WIOs and were subject to the Unit Agreement and Unit Operating Agreement executed November 22, 1982.

The defendant, Anschutz, entered into an agreement with Natural Gas Pipeline Company of America ("NGPL") in 1976 whereby NGPL would provide twenty million dollars ($20,000,000) in exploration funds in exchange for preferential rights to buy the gas produced from the AREU. Pursuant to that agreement, Anschutz entered into a contract for sale of gas to NGPL in March, 1981. (Tr. Vol. III, pp. 8-10). That contract provided that Anschutz would deliver and NGPL would pay for all gas "owned or controlled" by Anschutz, except that gas necessary for operational purposes. (Ex. 5).

In the spring of 1982, Anschutz began to discuss selling some of its interest in the AREU, subject to the NGPL contract, to Amoco. Those discussions did not lead to an agreement, partially because Amoco considered that Anschutz's contract with NGPL was not as favorable at is could be under the market conditions then existing. (Tr. Vol. VI, p. 10; Ex. 34). Instead, Amoco decided to delay in entering into a gas sales contract,

in the expectation that the market would improve. (Ex. 50).

In July, 1982, Mobil Rocky Mountain, Inc. ("Mobil") purchased half of Anschutz's interest in two sections of the AREU, and was assigned a corresponding share of Anschutz's NGPL contract.

In November, 1982, Anschutz and Mobil were the only WIOs with long-term gas sales contracts. However, Amoco's representative, James W. Calvin, testified at a hearing before the Utah Conservation Commission on November 30, 1982 that seven of the eight WIOs had complete gas sales contracts, and that the eighth (Amoco) would be selling under temporary contracts. (Ex. 87). Amoco representatives made repeated assurances to Anschutz and the other WIOs that gas sales contracts would be forthcoming.

Amoco did in fact expect to market its share of gas, as evidenced by its internal planning memoranda. (Ex. 25). No substantial gas volumes were expected to be available for sale from the AREU until 1985, and Amoco made the decision to delay entering into a long-term commitment, with the expectation that gas prices would continue to rise (Ex.s 50, 105, 128). When gas prices fell, Amoco continued to delay entering into a long-term commitment, in the hopes that gas prices would someday rise. (Vol. V, p. 188).

During the period between unitization (December 1, 1982) and the filing of this suit (June 5, 1986), Amoco had the following gas sales:

START	END	PRICE (MMBTU)	PURCHASER
03/01/83	11/30/83	2.500	Mountain Fuels
12/01/83	03/31/84	3.000	Mountain Fuels
01/01/84	12/31/84	2.500	NWPL
05/26/85	07/26/85	2.324	WWPC (Stored gas, WPA)

(Plaintiff's ex. 15).

During the period between unitization (December 1, 1982) and the filing of this suit (June 5, 1986), Champlin had no gas sales. (P ex. 18) Champlin did have an option contract with Mountain Fuels, but no gas was sold under that contract.

During the period between unitization (December 1, 1982) and the filing of this suit (June 5, 1986), Anschutz sold no more than its working interest owner's share of gas available for sale. (Plaintiff's post-trial brief, p. 29).

Defendant moved for summary judgment on the narrow issue of whether § 5.11 requires a party to have a gas purchaser of its own before it may take advantage of the market sharing provisions of that section. The Court denied the motion in its Order of November 23, 1988, holding that the phrase " 'is reasonably and fairly susceptible of more than one meaning.' " (*quoting Harrison Western Corp. v. Gulf Oil Co.*, 662 F.2d 690, 695 (10th Cir. 1981). We held that the term "excess gas" used in § 5.11 could mean either the quantity left after a purchaser had taken some gas, or any quantity of gas unsold. Because that portion of § 5.11 was ambiguous, we received extrinsic evidence at trial in order to determine the mutual intent of the parties at the time of contracting. Such evidence may include the pertinent circumstances surrounding the transaction, and the conduct of the parties. *Pepcol Mfg. Co. v. Denver Union Corp.*, 687 P.2d 1310 (Colo. 1984).

The minutes of the 42nd WIO meeting, prepared by Amoco's R.B. Giles as Chairman of the WIO committee, stated that § 5.11 provided that "those parties who don't have a gas market will share proportionately in the market that is available." (Ex. 66).

Ted P. Stockmar, a partner in the Denver law firm of Holme, Roberts & Owen, and the attorney for Anschutz, testified that the WIOs never really addressed the issue

of excess gas, because they didn't expect there would be any. (Tr. Vol. IV, p. 29).

Jan Steiert, an attorney who assisted Stockmar and who participated in drafting § 5.11, recorded her understanding of the provisions as follows:

> If any Party is allocated more gas than its purchaser will buy, all other Parties must sell that Party's gas to their purchasers. If the purchasers will not buy all the excess gas, then the amount not sold is deemed owned by all Parties and all Parties share in loss caused by reinjection or disposal. Parties settle accounts on monthly basis. Excess gas sold according to terms of Selling Party's gas contract. Party whose gas is being sold indemnifies all.

(Ex. 85).

Amoco's Giles testified that his understanding of § 5.11 at the time of drafting was that "those parties who do not have a market will share proportionately in the market that is available." (Tr. Vol. I, p. 46). T.J. Wheeler, who was Champlin's natural gas production manager at the time, testified that his understanding of the purpose of § 5.11 was "[t]o share the market and to cash balance on a monthly basis." (Tr. Vol. I, p. 168). However, Wheeler communicated his objection to the language of § 5.11 to Champlin management. Wheeler testified that he particularly objected to the language which he interpreted to require that a party have a purchaser before it could be eligible to share another party's gas market. (Vol. I, p. 185).

Miles A. Williams, Anschutz's Executive Vice President, testified that his understanding of § 5.11 was "that each party would have a purchaser, and at certain times it would be physically impossible for their purchasers to take all of the gas. And there would be inherent imbalances doing that. And if the nonselling party requested a selling party to share his market, and if the selling

party's purchaser was willing to take the gas of the nonselling party, we would take that gas along with our contract and remit the proceeds for that party's equity share of the gas taking a loan to the nonselling party." (Tr. Vol. III, p. 31).

John D. Haley, who had been Anschutz's Vice President of Production and negotiated the Unit Agreement, also testified that a gas purchaser was a prerequisite to the market sharing provisions of § 5.11. (Tr. Vol. IV, p. 187).

Representatives of the small WIOs also testified, and they uniformly stated not only that they understood § 5.11 to be a market sharing provision, but also that they would not have entered into an agreement that required a gas purchaser to trigger the sharing provision, because they never expected to have a gas purchaser. (W.O. Granberry, WIO representative for Tom Brown, Inc., Vol. I, p. 90; Charles F. Hedges, WIO representative for BWAB, Inc., Vol. II, pp. 10, 11).

Amoco's income projections (Ex. 83, November 9, 1982; Ex. 112, November 4, 1983), include no mention of market sharing revenues. However, Amoco did pay royalties and taxes on the expected market sharing revenues. (Ex. 173, 174, 179, 214).

Champlin's Wheeler testified that Champlin shared its gas sales revenues (Tr. Vol. I, p. 169). BWAB's Brownlie stated that he had requested and received revenues from both Amoco and Champlin (Tr. Vol. I, p. 111). Amoco's Scott Emerson testified that "To my knowledge, we always share the PA sales." (Tr. Vol. V, p. 146). Amoco did dispose of Mesa's share of gas production under Amoco's short-term contract with Mountain Fuel Supply Company, after Mesa requested that Amoco "temporarily market its share of gas production pursuant to the Operating Agreement . . ." (Ex. 100).

Division orders reveal that various WIOs had authorized Amoco to sell their working interest shares of pro-

duction for them, and to remit payment to them for their share of the proceeds. (Ex. 97, 116).

The evidence suggests that Anschutz itself understood § 5.11 to be a market sharing provision. In a letter to Amoco's Steve Souders dated March 29, 1985, John Haley suggested a resolution to the WIO's differences by proposing to make a payment to Amoco as unit operator for distribution to the WIOs. That proposal could not have been made if Anschutz had not recognized an obligation to share its market under § 5.11. (Plaintiff's ex. 1) In June, 1985, Anschutz corporate counsel Noel Burke, acting under the instruction of Anschutz Vice President Miles Williams, notified the other WIOs that the proposal was withdrawn. (Tr. Vol. V, p. 55). The WIOs were first informed that Anschutz might not recognize an obligation to share its market during the February, 1986, WIO meeting. At that meeting, Jack Haley reassured the WIOs once again that Anschutz would honor its obligations under the Operating Agreement. Noel Burke said "Jack, I don't know if we can be saying that anymore." (Scott Emerson testimony, Tr. Vol. V, p. 150; Ray O. Brownlie testimony, Vol. I, p. 108; T.J. Wheeler testimony, Tr. Vol. I, p. 174). Burke himself only recalls that at the February meeting "the issue was squarely on the table as to whether we were or were not going to make a payment," and at that time he stated that Anschutz would make no payment. (Vol. V, pp. 59-60).

In a complaint it filed against NGPL on June 4, 1985, in the Third Judicial District Court of Salt Lake County, Anschutz stated that it "has obtained an interest in, and from time to time in the future expects to obtain interest in, natural gas not taken from the Unit by the other unit members ('excess gas')." (Plaintiff's ex. 12).

Further evidence that Anschutz originally believed § 5.11 obligated it to share its market is found in the Annual Reserves Reports for the AREU prepared for

Anschutz annually by Scientific Software Corporation. The 1985 report refers to a "gas contract sharing agreement." (Plaintiff's ex. 11d, p. 3.1). The 1986 report refers to a "gas contract sharing agreement which has now been discontinued." (Plaintiff's ex. 11e, p. 3.1). Both reports were prepared by Martin French, a Scientific Software employee, who stated in his deposition that the information they contained was provided to him entirely by Anschutz. (Deposition of Martin French, pp. 22, 34).

Mobil entered into a settlement agreement with the other WIOs (except Anschutz) in May, 1988. The settlement agreement states that "Mobil is uncertain about the application of Section 5.11 of the Unit Operating Agreement." It further contains a provision stating that the agreement is "no admission." (Plaintiffs' ex. 6). Mobil stated at trial that it remained uncertain as to the meaning and application of § 5.11, but that it settled to resolve those uncertainties. Whatever Mobil's reasons for settling, the other WIOs appear to be satisfied that it has fulfilled its obligations under § 5.11.

The evidence shows that Amoco considered the possibility of market sharing as early as October, 1983 (Ex. 110). By 1985, Amoco clearly considered sharing in Anschutz's contract as an alternative in its marketing strategy, as evidenced by its computer analyses. (Ex. 192, 193).

Anschutz requested by letter dated May 22, 1984, that Amoco, as unit operator, begin delivery of Anschutz's share of gas to NGPL. (Ex. 132). Amoco agreed to begin gas deliveries to NGPL during the week of June 11, 1984. In the same letter, Amoco requested that Anschutz remit to Amoco "the gas revenues attributable to the working interest partners . . ." pursuant to § 5.11 of the Unit Operating Agreement, so that Amoco could then distribute the funds to the WIOs according to their working interest shares. (Ex. 134).

Anschutz responded as follows:

> Paragraph 5.11 of the UOA provides that a Party with a gas market will be obligated to share its market with a Party whose share of the gas available for sale exceeds the quantity of gas such Parties [sic] gas purchaser will take if requested to do so by the Party owning such gas.
>
> We ask that each Party wishing to share Anschutz's market give us written notice stating the quantity of gas such Parties [sic] gas purchaser will take and requesting that Anschutz share its market to sell the excess gas. (Ex. 135).

Amoco did not respond to this request by Anschutz. Mesa Petroleum Company responded to the request in a letter dated June 25, 1984. Mesa requested that Anschutz "market Mesa's share of the gas produced and remit to Amoco the gas revenue attributable to Mesa's working interest" pursuant to § 5.11. (Ex. 137).

Champlin made a similar request of Anschutz in a letter dated July 20, 1984, asking it to "dispose of Champlin's share of the gas available for sale . . ." in the East PA pursuant ot § 5.11. (Ex. 140).

Anschutz requested that the matter of "WIO's request Anschutz and Mobil to sell under NGPL contract" be placed on the agenda for the December 13, 1984 WIO meeting. (Ex. 154). The minutes for that meeting state that "Each WPA partner needs to submit a request to Anschutz and Mobil to share the market under their contract." (Ex. 158).

Tom Brown, Inc., in a letter dated December 27, 1984, also requested a share in Anschutz's gas market pursuant to § 5.11. The letter requested Anschutz's "advisement as to existing markets for the sale of gas from the Anschutz Ranch East Unit Area and specific details concerning applicable gas sales contracts entered into" (Ex. 163).

In April, 1985, NGPL brought suit against Anschutz and Mobil, in an attempt to relieve itself of a gas purchase contract which had become burdensome in the falling market of 1985. The suit against Anschutz was settled in April, 1988, and the contract between them was terminated.

Anschutz responded to the repeated requests for market sharing payments from the other WIOs by saying that it could make no such payment while the NGPL litigation was pending. The understanding of the other WIOs was that Anschutz's position in the NGPL suit, that it had delivered no more than the gas it owned or controlled, would be jeopardized if it made payments to the other WIOs for their gas. The other WIOs expected that, once the NGPL suit was settled, Anschutz would make gas market sharing payments pursuant to § 5.11. (Tr. Vol. I, pp. 107, 173-74). The WIOs were first expressly informed that their hope may be groundless at a WIO meeting in February, 1986. Plaintiffs brought this suit soon thereafter.

CONCLUSIONS OF LAW

I. Jurisdiction

Defendant Anschutz alleges that this Court does not have jurisdiction to hear this case under 28 U.S.C. §1332 (1982) because there is not complete diversity between the parties. Anschutz argues that Amoco's principal place of business is in Colorado (which is also the principal place of business of Anschutz). Anschutz further argues that Amoco has not met the burden of proving where its principal place of business *is*; instead it has merely alleged where it is *not*.

Amoco argues that its principal place of business is either in Illinois, where its "nerve center" is, or in Wyoming, where it holds its assets and makes its day-to-day decisions.

28 U.S.C. § 1332(c) provides that "a corporation shall be deemed a citizen of any State by which it has

been incorporated and of the State where it has its principal place of business. . . ."

A corporation's principal place of business is a question of fact to be determined by the " 'character of the corporation, its purposes, the kind of business in which it is engaged, and the situs of its operations.' " *United Nuclear Corp. v. Moki Oil and Rare Metals Co.*, 364 F.2d 568, 570 (10th Cir. 1966) (*cert. denied*, 385 U.S. 960 (1966)).

Because Federal courts are courts of limited jurisdiction, there is a presumption against jurisdiction, and the burden of establishing it is on the party invoking such jurisdiction. *Basso v. Utah Power and Light Co.*, 495 F.2d 906, 909 (10th Cir. 1974). The Court, however, need only determine that Amoco's principal place of business is not in Colorado; it need not determine where Amoco's principal place of business is. *Moki*, 363 F.2d at 572, n.11.

Both parties cite *Moki* as the case controlling the Court's determination of Amoco's principal place of business. In *Moki*, the Tenth Circuit had before it a corporation which carried on its business "in a number of states, no one of which is clearly the state in which its business is principally conducted." *Id.* at 570. United Nuclear Corp. was a vertically integrated company with five geographically separate divisions. The *Moki* court, applying the "nerve center" test, held that a corporation's principal place of business was the state "where a substantial part of its business is transacted and from which centralized general supervision of all of its business is exercised. . . ." *Id.*

The citizenship of Amoco is not nearly so complex an issue as was the citizenship of United Nuclear. We see no need to apply the "nerve center" test here, where the complex and geographically widespread corporate system

that existed in *Moki is* not present.[2] The "center of activity" test developed by the Third Circuit in *Kelly v. United States Steel Corp.*, 284 F.2d 850 (1960), and adopted in this circuit in *Fellers v. Atchison, Topeka and Santa Fe Ry Co.*, 330 F. Supp. 1334 (D.Kan. 1971), is more appropriate to the circumstances of this case. The "center of activity" test determines a corporation's principal place of business by looking at the state "where the bulk of the assets and where management of day-to-day affairs are located. . . ." *Id.* at 1338. The two tests are reconcilable, and the choice between the two depends on the character of the corporation. Where, as here, all of the company's assets are in a single location, the "center of activity" test more logically applies. *Armstrong v. Goldblatt Tool Co.*, 609 F.Supp. 736 (D.Kan. 1985); Wright, Miller & Cooper, *Federal Practice and Procedure*; Jurisdiction 2d § 3625.

Plaintiff in this suit is neither Amoco Corporation nor Amoco Production; it is Amoco Rocmount, whose sole function is to manage the AREU, located in Wyoming and Utah. Its corporate structure is simple, and its presence is geographically limited. Since Amoco's assets and production activities are located entirely in Wyoming and Utah, its principal place of business is also in Wyoming or Utah. We need not determine in which of these two states Amoco's principal place of business is; it is sufficient that we have decided it is not in Colorado.

Plaintiff Amoco has met its burden of proof that its principal place of business is in a state other than Colorado. The Court therefore has jurisdiction under 28 U.S.C. § 1332.

---

[2] Defendant does not argue that Amoco Rocmount is in fact the alter ego of Amoco Production; if it did, there would still be diversity because the "nerve center" of Amoco Production is indisputably in Illinois. The "nerve center" test would be appropriate if the Court were attempting to determine the principal place of business of Amoco Production, which has a complex corporate structure and various geographically distinct offices.

2. Applicable law

A federal court in a diversity case such as this must apply the choice of law principles of the forum state. *Dresser Industries, Inc. v. Sandvick*, 732 F.2d 783, 785 (10th Cir. 1984). Thus, the Court will apply Wyoming law in determining which law applies. Under Wyoming law, the law of the state of performance governs unless it clearly appears that the parties intended otherwise. *Mullinax Eng'g Co. v. Platte Valley Const. Co.*, 412 F.2d 553, 555 (10th Cir. 1969); *Nelson v. McAdams, Roux and Assoc., Inc.*, 688 F.Supp. 1502, 1505 (D. Wyo. 1988). The parties did clearly express their intention that Colorado law govern in § 32 of the Unit Agreement, which provides:

> This agreement shall be governed by and shall be construed, interpreted and enforced in accordance with the law of the State of Colorado.

The provisions of the Unit Agreement are applicable to the Unit Operating Agreement as well. The two agreements were drafted together and contain numerous references to each other. When separate documents relate to the same property and the same parties, they are to be treated as a single agreement. *Carlson v. Carlson*, 775 P.2d 478, 481 (Wyo. 1989). The Court will therefore apply Colorado law in determining the meaning of § 5.11.

3. Meaning and applicability of § 5.11

Balancing agreements are common devices in unitized gas fields. When one of several WIOs in a gas field does not take its proportionate share, the question is how that party will be reimbursed for its lost share. In *Beren v. Harper Oil Co.*, 546 P.2d 1356 (Okla. 1975), the court was asked to correct an imbalance between five WIOs, three of whom sold to one purchaser, and two of whom sold to another. For reasons having to do with line pressure, one purchaser did not take all it was entitled to,

leaving two WIOs underproduced. They sued for an accounting and cash balancing. The court recognized three methods for balancing:

> 1) Balancing in kind. The underproduced party takes a percentage of the overproduced party's share until the imbalance has been made up.
>
> 2) Periodic cash balancing. The underproduced party receives cash, and the imbalance is immediately made up.
>
> 3) Cash balancing upon reservoir depletion.

The court noted it was the regulatory authority's policy and the custom in the trade to balance in kind wherever possible. However, in this case the well was depleting, and the cause for the imbalance no longer existed, so equity dictated an accounting and cash balancing. *Id.* at 1360.

In 1980 the United States District Court for the Western District of Oklahoma considered the issue of gas balancing in *United Petroleum Exploration v. Premier Resources,* 511 F. Supp. 127 (W.D. Okla. 1980). In that case the defendant, Premier, had taken the entire production of gas during a period in which United was not capable of taking its share in kind. United sued for balancing, either in the form of gas in kind or of a current cash balancing (with gas prices climbing, this would put United in a better position than if it had taken the gas all along). Premier had been willing to pay United its share of the proceeds, but only at the rate it had received at the time. The court recognized the preference for in kind balancing, but, citing *Beren,* concluded that the special circumstances here dictated cash balancing.

The test for which method to select is which would most nearly restore the parties to the positions they would have occupied had the imbalance not occured. The market situations in existence at the time of *Beren* and *Premier* were such that the underproduced party would have benefited by taking in kind. In neither case was there a

balancing agreement; the courts relied entirely on equity to achieve the results they did.

In *Chevron v. Belco Petroleum Corp.*, 755 F.2d 1151 (5th Cir. 1985), there was a balancing agreement between the operator and Chevron, the royalty interest owner. The agreement provided only for taking in kind, and Chevron did not take its share before the well stopped producing. The court held that the parties contractually allocated risk of loss, and reversed a lower court award of cash to Chevron.

In *Pogo Producing Co. v. Shell Offshore, Inc.*, 898 F.2d 1064 (5th Cir. 1990), the court affirmed a lower court ruling that, absent a controlling agreement between the parties, the court would rely on the "dictates of law, equity, or usage" and require in kind balancing. *Pogo Producing Co. v. Shell* (E.D. Louisiana #88-1405). In affirming the lower court, the Fifth Circuit relied on *Beren* and *Premier* for its conclusion that balancing in kind was the preferred method, although "circumstances may exist which make balancing in kind inequitable." *Pogo*, 898 F.2d at 1067.

In *Shell Offshore, Inc. v. Marr*, No. 89-0846 (E.D.La. Jan. 5, 1990) (LEXIS, Genfed library, Currnt file), Shell and Marr, working interest co-owners, entered into an agreement pursuant to which Shell advanced cash payments to Marr which would be paid back "from the proceeds of one-half (½) of his working interest production in the . . . Wells. . . ." When the market collapsed, Marr's repayment diminished to such an extent that Shell was faced with the prospect it would be unable to recover, and it sued for full repayment of the balance. The court held that the clear terms of the contract provided for repayment out of Marr's interest in the gas sales, and Shell was bound by that agreement whether or not it would permit full repayment under the changed circumstances. The court granted summary judgment in favor of Marr.

The facts in the case before us are different than those in the cases described above. Unlike the parties in *Beren, Premier,* or *Pogo,* the parties here have entered into a controlling agreement. Unlike the agreement in *Belco* and *Marr,* the agreement here, although ambiguous, clearly provides for cash balancing.

The one fact about which there does seem to be general agreement is that the WIOs considered in kind or volumetric balancing, and rejected that method. Gas recovery in the AREU required nitrogen injection, thus the quality of the gas would decrease, and the cost of processing the gas would increase over time. The WIOs, experienced gas producers who met over a two-year period to devise the Unit Agreement and Unit Operating Agreement, rejected in kind balancing in favor of cash balancing. The Court cannot rely simply on the "dictates of law, equity and usage" here to order the preferred solution of in kind balancing, because the parties here have entered into a contract which specifically rejects in kind balancing. Furthermore, nitrogen injection in the AREU makes balancing in kind inequitable. The Court finds that there was a meeting of the minds as to the meaning of § 5.11, and that the Court and the parties are bound by that contract. The Court's task is to determine the meaning of the ambiguous term, "excess gas."

The Court now holds that the reference to "gas purchaser" used in § 5.11 was simply a reference point, and not a prerequisite to market sharing. The testimony and evidence presented to the Court compels the conclusion that the mutual intention of the parties was to share pro rata in any gas market available, regardless of whether a WIO had ever had a gas purchaser.

The Court evaluates the testimony of the spokesmen for the principals in this case with caution. Amoco's Giles, Champlin's Wheeler, and Anschutz's Stockmar and Williams are all so closely involved in the outcome of this

case as to cloud their objectivity. The testimony of Anschutz's Haley is so riddled with his inability to recall that it is of doubtful value in determining the facts of this case. Giles' testimony, however, is supported by his contemporaneous interpretation of § 5.11, as evidenced by the minutes of the 42nd WIO meeting. The Court also finds persuasive the testimony of Granberry, Brownlie and Hedges. These representatives of the smaller WIOs had less at stake in the outcome of this case, yet they uniformly testified that their understanding of § 5.11 was that it provided for market sharing without any requirement of a gas purchaser. This is particularly convincing in light of the small WIOs' testimony that they did not have a sufficient volume of gas to obtain their own purchasers, and never expected to have their own purchasers. Under those circumstances, it is inconceivable that they would have entered into an agreement requiring a gas purchaser before they could benefit from their interests in the AREU.

Turning to the parties' post-agreement conduct, the Court again finds that the evidence overwhelmingly supports the conclusion that all parties intended § 5.11 to be a market sharing provision without a gas purchaser prerequisite. "[I]t is an accepted rule of construction and interpretation of contracts that the meaning adopted should be in harmony with that meaning indicated by the actions of the parties and should be the interpretation adopted by the parties." *United States v. 1,253.14 Acres of Land*, 455 F.2d 1177, 1180 (10th Cir. 1972). Amoco paid royalties and taxes on the revenues it expected from the NGPL sales. Anschutz itself expected to share its market until sometime early in 1986, as evidenced by the Scientific Software reports, the complaint in the NGPL lawsuit in Utah, and the March 1985 letter proposing settlement. The only reason that the other WIOs did not press Anschutz for payment sooner was that they understood compliance with the market sharing provi-

sion might jeopardize Anschutz's lawsuit with NGPL. As soon as they understood, in early 1986, that Anschutz did not intend to share its market, the other WIOs acted.

Reasonable interpretations rather than unreasonable interpretations are favored by the law. *Offshore Trading Co. v. Citizens Nat'l Bank,* 650 F.Supp. 1487 (D.Kan. 1983). The Court finds no reasonable explanation for why the parties would have intended to require a gas purchaser before the market sharing provisions would go into effect. We further note that § 5.11 also provides that any excess gas that cannot be sold shall be reinjected or otherwise disposed of, and "will be deemed to be the gas of all Parties . . . ." Under Anschutz's interpretation of the agreement, it would be entitled to derive the sole benefit from the sale of its share of gas to NGPL while the share of the other WIOs was reinjected, and would also be entitled to its pro rata share of the reinjected gas. In addition to being contrary to the intent of the parties, that result would require the Court to interpret the two provisions of § 5.11 to conflict with each other. In interpreting the provision of an agreement, we must examine the contract as a whole and interpret the provisions in harmony with each other. *Rohn v. Weld County Bank,* 395 P.2d 1003, 1005 (Colo. 1964).

4. Anschutz's counterclaims

Anschutz's second and third counterclaims are based on the alleged material misrepresentation of the plaintiffs and the other signatories to the contract that they had or would have gas purchasers. The evidence is clear that at the time the Unit Operating Agreement was entered into, all parties expected to have gas purchasers. Anschutz suggests Amoco's 1982 decision to hold off entering into a gas contract is evidence of a nefarious scheme to mislead the other WIOs. In fact, the letter relied on by Anschutz (Ex. 50), in which A.P. Payne states that "Amoco's interest will be best served by delaying gas

sales from Anschutz Ranch East Field for as long as possible," goes on to say that the reason for that is an expected "gas supply crunch by late 1984. . . ." As Anschutz's expert witness, John W. Wilson, testified that decision turned out to be the wrong choice, but it was not an imprudent business decision. (Tr. Vol. V, p. 193).

Anschutz further contends that Champlin made material misrepresentations, by stating that it too had a contract when it had only an option.

The Court finds that in 1982 all parties believed in good faith that they would have gas purchasers, and that any representations to that effect were not misrepresentations. Anschutz's counterclaims based on that contention are therefore without basis.

CONCLUSION

The Court finds that there was a meeting of the minds as to the limited purpose of § 5.11. Defendant's motion for a directed verdict is therefore DENIED.

The first sentence of § 5.11, viewed in light of the evidence showing the intent of the parties at the time of contracting and their actions subsequent to entering the contract, means this: The proceeds of all natural gas sold from the unit shall be distributed pro rata among all the working interest owners.

The Court holds that the defendant Anschutz is liable to the plaintiffs for their pro rata share of the gas sales, and that plaintiffs are entitled to an accounting. The term of the accounting shall be determined at a later date, as will defendant's remaining counterclaims.

The Court further finds that there is no factual support for defendant's allegations that plaintiffs made misrepresentations of material fact in relation to their gas sales contracts.

Dated this 30th day of July, 1990.

/s/ Clarence A. Brimmer
Chief Judge
United States District Court

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 92-8024
(D.C. No. 86-172-B)

AMOCO ROCMOUNT COMPANY, a Delaware corporation, as Unit Operator of, and as an individual interest owner in the Anschutz Ranch East Unit; CHAMPLIN PETROLEUM COMPANY, a Delaware corporation, as an individual interest owner in the Anschutz Ranch East Unit,
Plaintiffs-Appellees,

v.

THE ANSCHUTZ CORPORATION, a Kansas corporation,
Defendant-Third-Party-Plaintiff-Appellant,

v.

JERRY D. ARMSTRONG, J.H. BANDER, RAY O. BROWNLIE, JAMES B. WALLACE, BWAB, INC., CHEVRON, USA, INC., MESA PETROLEUM COMPANY, MTS LIMITED PARTNERSHIP, MOBIL ROCKY MOUNTAIN, INC., PAN CANADIAN PETROLEUM, INC.,
Third-Party-Defendants-Appellees.

No. 92-8027

AMOCO ROCMOUNT COMPANY, a Delaware corporation, as Unit Operator and as an individual interest owner in the Anschutz Ranch East Unit,
Plaintiff-Appellant,
and

CHAMPLIN PETROLEUM COMPANY, a Delaware corporation, as an individual interest owner in the Anschutz Ranch East Unit,

Plaintiff,

v.

THE ANSCHUTZ CORPORATION, a Kansas corporation,

Defendant-Appellee,

v.

JERRY D. ARMSTRONG, J.H. BANDER, RAY O. BROWNLIE, JAMES B. WALLACE, BWAB, INC., CHEVRON USA, MESA PETROLEUM COMPANY, MTS LIMITED PARTNERSHIP, MOBIL ROCKY MOUNTAIN, INC., and PAN CANADIAN PETROLEUM, INC.,

Third-Party Defendants.

ORDER

Filed October 22, 1993

Before McKAY, Chief Judge, RONEY*, LOGAN, SEYMOUR, ANDERSON, BALDOCK, BRORBY, EBEL, KELLY, Circuit Judges.

The court has before it the Anschutz Corporation's petition for rehearing with a suggestion for in banc review of one issue. The panel has voted to deny rehearing on all issues. It did reexamine in particular the proper choice of law on prejudgment interest. It declines to certify the issue to the Wyoming Supreme Court at this late date and remains convinced that court would apply the principles enunciated in Restatement (Second) Conflict of Laws.

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* The Honorable Paul H. Roney, Senior United States Circuit Judge United States Court of Appeals for the Eleventh Circuit, sitting by designation.

Although Wyoming has cited the first Restatement in support of its rule that tort claims are governed by the law of the state in which the tort was committed, adopted in *Ball v. Ball,* 269 P.2d 302 (Wyo. 1954), all Wyoming nontort cases since 1971 have cited and relied upon Restatement (Second). See *Stanbury v. Larsen,* 803 P.2d 349, 355 (Wyo. 1990) (action on promissory note); *Cherry Creek Dodge, Inc. v. Carter,* 733 P.2d 1024, 1027 (Wyo. 1987) (priority of liens); *In re Adoption of MM,* 652 P.2d 974, 980 (Wyo. 1982) (jurisdiction to grant adoption); *State ex rel. Klopotek v. Dist. Ct. of Sheridan County,* 621 P.2d 223, 229 (Wyo. 1980) (child custody jurisdiction); *see also Baker v. First Nat'l Bank of Denver,* 603 P.2d 397, 401 (Wyo. 1979) (J. Thomas dissenting) (mortgage foreclosure).

No member of the court has called for a vote on the in banc suggestion. Therefore the request for in banc review is denied. Judges Moore and Tacha are recused and did not participate.

Entered for the Court

/s/ Robert L. Hoecker
ROBERT L. HOECKER
Clerk

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 92-8024
(D.C. No. 86-172-B)

AMOCO ROCMOUNT COMPANY, a Delaware corporation, as Unit Operator of, and as an individual interest owner in the Anschutz Ranch East Unit; CHAMPLIN PETROLEUM COMPANY, a Delaware corporation, as an individual interest owner in the Anschutz Ranch East Unit,

Plaintiffs-Appellees,

v.

THE ANSCHUTZ CORPORATION, a Kansas corporation,

Defendant-Third-Party-Plaintiff-Appellant.

v.

JERRY D. ARMSTRONG; J.H. BANDER; RAY O. BROWNLIE; JAMES B. WALLACE; BWAB, INC.; CHEVRON, USA, INC.; MESA PETROLEUM COMPANY; MTS LIMITED PARTNERSHIP; MOBIL ROCKY MOUNTAIN, INC.; PAN CANADIAN PETROLEUM, INC.,

Third-Party-Defendants-Appellees.

No. 92-8027

AMOCO ROCMOUNT COMPANY, a Delaware corporation, as Unit Operator and as an individual interest owner in the Anschutz Ranch East Unit,

Plaintiff-Appellant,

and

CHAMPLIN PETROLEUM COMPANY, a Delaware corporation, as an indivdual interest owner in the Anschutz Ranch East Unit,

Plaintiff,

v.

THE ANSCHUTZ CORPORATION, a Kansas corporation,
Defendant-Appellee,

v.

JERRY D. ARMSTRONG; J.H. BANDER; RAY O. BROWNLIE; JAMES B. WALLACE; BWAB, INC.; CHEVRON USA; MESA PETROLEUM COMPANY; MTS LIMITED PARTNERSHIP; MOBIL ROCKY MOUNTAIN, INC.; PAN CANADIAN PETROLEUM, INC.,
Third-Party-Defendants.

JUDGMENT

Entered September 13, 1993

Before LOGAN, RONEY* and SEYMOUR, Circuit Judges.

This cause came on to be heard on the record on appeal from the United States District Court for the District of Wyoming, and was argued by counsel.

Upon consideration whereof, it is ordered that the judgment of that court is affirmed except with respect to the prejudgment issues. On remand the court is also directed to re-examine its calculation of the sharing of attorneys' fees and costs with respect to the NGPL litigation.

Entered for the Court

Robert L. Hoecker,
Clerk

By: /s/ Patrick Fisher
PATRICK FISHER
Chief Deputy Clerk

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* The Honorable Paul H. Roney, Senior United States Circuit Judge, United States Court of Appeals for the Eleventh Circuit, sitting by designation.

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

No. C86-0172-B

AMOCO ROCMOUNT COMPANY, *et al.*,
Plaintiffs,

v.

THE ANSCHUTZ CORPORATION,
Defendant and
Third-Party Plaintiff,

v.

JERRY D. ARMSTRONG, *et al.*,
Third-Party Defendants.

[Filed Mar. 16, 1992]

FINAL JUDGMENT

Pursuant to a Final Order for Entry of Judgment, dated March 13, 1992, and Rule 58 of the Federal Rules of Civil Procedure, Judgment is hereby entered as follows:

1. On the Plaintiffs' Complaint, in favor of the Plaintiffs and against The Anschutz Corporation in the amount of $21,034,144.61, plus prejudgment interest of $8,289,968.70, for a total of $29,324,-113.31;

2. On Count IV of The Anschutz Corporation's Amended, Restated and Supplemental Counterclaims ("Counterclaims"), in favor of The Anschutz Corporation and against Amoco Rocmount Company in the amount of $475,326.00, plus prejudgment interest in the amount of $188,-421.45, for a total of $663,747.45;

3. On Count VI of the Counterclaims, in favor of The Anschutz Corporation and against Amoco Rocmount Company in the amount of $386,-278.56, plus interest in the amount of $170,-638.75, for a total of $537,917.31;

4. On Count XXII of the Counterclaims, in favor of The Anschutz Corporation and against Amoco Rocmount Company in the amount of $1,412,-927.13, plus prejudgment interest in the amount of $482,822.44, for a total of $1,895,749.57;

5. On Count XXXI of the Counterclaims, in favor of The Anschutz Corporation and against Amoco Rocmount Company in the amount of $1,389,-240.00, plus prejudgment interest in the amount of $453,930.70, for a total of $1,843,170.70

DATED this 16th day of March, 1992.

BY THE CLERK OF THE COURT:

/s/ Betty A. Guess
Acting District Court Clerk

MBR/bfs

Entered on the Docket March 17, 1992

Supreme Court, U.S.
FILED
JAN 12 1994
OFFICE OF THE CLERK

No. 93-903

In The

Supreme Court of the United States

October Term, 1993

THE ANSCHUTZ CORPORATION,

Petitioner,

v.

AMOCO ROCMOUNT COMPANY and
UNION PACIFIC RESOURCES COMPANY,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Must a district court determine in all diversity cases the specific state in which a party corporation's principal place of business is located, even when the district court has made specific findings of fact that the party has satisfied its burden of proving that none of the possible locations of its principal place of business would destroy complete diversity?

2. Was it proper for the district court and the Tenth Circuit to base their determinations of the principal place of business of one of the parties on application of a "total activity" test when (1) every circuit has approved similar tests allowing consideration of the totality of factors giving rise to such a determination, and (2) strict application of a "nerve center" test to an uncomplicated corporate structure such as the one in this case would be inappropriate?

RULE 29.1 LISTING

Respondents are Amoco Rocmount Company and Union Pacific Resources Company f/k/a Champlin Petroleum Company. Amoco Rocmount Company's parent is Amoco Production Company, whose parent is Amoco Corporation. Amoco Rocmount Company has no subsidiaries.

Union Pacific Resources Company's parent is Resources Holding, Inc., whose parent is Union Pacific Corporation. Union Pacific Resources Company has no subsidiaries not wholly owned by it.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

RULE 29.1 LISTING ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE WRIT 4

1. Rocmount Satisfied Its Burden Of Proving Diversity Of Citizenship 4

2 Rocmount's Citizenship Was Correctly Held To Be Diverse From Anschutz's 8

3. There Is No Conflict Among The Circuits 14

4. This Case Represents A Poor Vehicle For Creating New Law Restricting The District Courts' Flexibility In Making Principal Place Of Business Determinations 20

CONCLUSION 22

TABLE OF AUTHORITIES

Page

CASES

Armstrong v. Goldblatt Tool Co., 609 F. Supp. 736 (D. Kan. 1985) 14

Bialac v. Harsh Bldg. Co., 463 F.2d 1185 (9th Cir. 1972), *cert. denied*, 409 U.S. 1060 (1972) 21

Casio, Inc. v. S.M. & R. Co., Inc., 755 F.2d 528 (7th Cir. 1985) 7

Celanese Corp. of Am. v. Vandalia Warehouse Corp., 424 F.2d 1176 (7th Cir. 1970) 7

Commissioner of Internal Revenue v. Soliman, 113 S.Ct. 701 (1993) 13

Danjaq, S.A. v. Pathe Communications Corp., 979 F.2d 772 (9th Cir. 1992) 14

Egan v. American Airlines, Inc., 324 F.2d 565 (2d Cir. 1963) 15

Fathers of the Order v. National Ben Franklin Ins. Co., 697 F. Supp. 971 (N.D. Ill. 1988) 19, 20

Fellers v. Atchison, Topeka & Santa Fe Ry. Co., 330 F. Supp. 1334 (D. Kan. 1971) 9

Gafford v. General Elec. Co., 997 F.2d 150 (6th Cir. 1993) 16

Grinter v. Petroleum Operation Support Serv., Inc., 846 F.2d 1006 (5th Cir. 1988), *cert. denied*, 488 U.S. 969 (1988) 16, 20

Harris v. Black Clawson Co., 961 F.2d 547 (5th Cir. 1992) 15

Industrial Tectonics, Inc. v. Aero Alloy, 912 F.2d 1090 (9th Cir. 1990) 16

TABLE OF AUTHORITIES – Continued

Page

Inland Rubber Corp. v. Triple A Tire Serv., Inc., 220 F. Supp. 490 (S.D.N.Y. 1963) 17

J.A. Olson Co. v. City of Winona, 818 F.2d 401 (5th Cir. 1987) 8, 12, 16, 17, 19, 20

Jerro v. Home Lines, Inc., 377 F. Supp. 670 (S.D.N.Y. 1974) 7

Kanzelberger v. Kanzelberger, 782 F.2d 774 (7th Cir. 1986) 16, 18, 19, 20

Kelly v. United States Steel Corp., 284 F.2d 850 (3rd Cir. 1960) 9, 15, 16

Leve v. General Motors Corp., 246 F. Supp. 761 (S.D.N.Y. 1965) 7

Lurie Co. v. Loew's San Francisco Hotel Corp., 315 F. Supp. 405 (N.D. Cal. 1970) 16, 17, 18

Mahoney v. Northwestern Bell Tel. Co., 258 F. Supp. 500 (D. Neb. 1966), *aff'd*, 377 F.2d 549 (8th Cir. 1967) 16

McDonough Power Equip., Inc. v. Greenwood, 464 U.S. 548 (1984) 7

Media Duplication Servs. v. HDG Software, 928 F.2d 1228 (1st Cir. 1991) 8

Mullins v. Beatrice Pocahontas Co., 374 F. Supp. 282 (W.D. Va., 1974), *aff'd without opinion*, 530 F.2d 969 (4th Cir. 1975) 15

Nassau Sports v. Peters, 352 F. Supp. 867 (E.D.N.Y. 1972) 7

Quaker State Dyeing & Finish Co. v. ITT Terryphone Corp., 461 F.2d 1140 (3rd Cir. 1972) 7

TABLE OF AUTHORITIES – Continued

Page

R.G. Barry v. Mushroom Makers, Inc., 612 F.2d 651 (2d Cir. 1979) 15

R.W. Int'l, Inc. v. Borden Interamerica, Inc., 673 F. Supp. 654 (D. P.R. 1987) 7

Roman Ramos v. H.B. Fuller Co., 729 F. Supp. 221 (D. P.R. 1990) 7

Scot Typewriter Co. v. Underwood Corp., 170 F. Supp. 862 (S.D.N.Y. 1959) 8, 16

Securities and Exch. Comm'n v. Chenery Corp., 318 U.S. 80 (1943) 8

Taber Partners I v. Merit Builders, Inc., 987 F.2d 57 (1st Cir. 1993), *cert. denied*, 114 S. Ct. 82 (1993) 14, 15, 20

Textron Elecs., Inc. v. Unholtz-Dickie Corp., 193 F. Supp. 456 (D. Conn. 1961) 7

Topp v. Compair, Inc., 814 F.2d 830 (1st Cir. 1987) 14

Torres v. Oakland Scavenger Co., 487 U.S. 312 (1988) 7

U.S.I. Properties Corp. v. M.D. Constr. Co., 860 F.2d 1 (1st Cir. 1988), *cert. denied*, 490 U.S. 1065 (1989) 20

United Nuclear Corp. v. Moki Oil & Rare Metals Co., 364 F.2d 568 (10th Cir. 1966), *cert. denied*, 385 U.S. 960 (1966) 8, 16, 21

University of Rhode Island v. A.W. Chesterton Co., 2 F.3d 1200 (1st Cir. 1993) 5

Vareka Invs., N.V. v. American Inv. Properties, Inc., 724 F.2d 907 (11th Cir. 1984), *cert. denied*, 469 U.S. 826 (1984) 16, 21

TABLE OF AUTHORITIES – Continued

Page

STATUTES

28 U.S.C. § 1332 1

28 U.S.C. § 2111 7

26 U.S.C. § 6091 12

OTHER AUTHORITIES

1 James W. Moore *et al., Moore's Federal Practice* ¶ 0.77 [1.-2] (2d ed. 1993) 14

1 James W. Moore *et al., Moore's Federal Practice* ¶ 0.77 [3.-1] (2d ed. 1993) 12

13B Charles A. Wright *et al., Federal Practice & Procedure* § 3625 (2d ed. 1984) 4, 14, 17, 18

No. 93-903

In The

Supreme Court of the United States

October Term, 1993

THE ANSCHUTZ CORPORATION,

Petitioner,

v.

AMOCO ROCMOUNT COMPANY and
UNION PACIFIC RESOURCES COMPANY,

Respondents.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Tenth Circuit**

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

STATEMENT OF THE CASE

The Petition asserts that Amoco Rocmount Company's ("Rocmount") principal place of business for purposes of diversity jurisdiction under 28 U.S.C. § 1332 is in Colorado. If it is not, then complete diversity existed, and the Writ should be denied.

Rocmount is a Delaware corporation created for the sole purpose of holding title to a working interest in a huge oil and gas reservoir known as the Anschutz Ranch East Unit ("AREU"), which interest was conveyed to it by

its parent, Amoco Production Company ("Production") on October 27, 1982. Joint Trial Ex. 82. The AREU is located entirely in the states of Utah and Wyoming, and straddles the border between those states. App. at 31a.

Rocmount carries on no operations whatsoever, maintains no employees, and has no office other than its executive office in Chicago, Illinois.[1] Plaintiff's Trial Ex. 22 ("Gates Depo.") at 6, 34, 50. Pursuant to the Management Agreement between Rocmount and Production, Production handles all operations involved in Rocmount's ownership interest in the AREU. Joint Trial Ex. 99. Production is based in Chicago, Illinois and there is no dispute in this case that Production's principal place of business is in Illinois. App. at 46a.[2] Production maintains several regional offices, including one in Denver, Colorado. Most of the operations of the AREU were conducted, however, at Production's Evanston, Wyoming district office. Gates Depo. at 6.

The underlying case was filed in June, 1986, and Respondents recovered damages in excess of $29 million for Anschutz's wrongful withholding of their funds. App. at 3a. After discovery and trial, the district court made specific findings of fact and conclusions of law that

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[1] The undisputed evidence before the district court was that Rocmount maintains no offices except its executive office in Chicago, but that *Production* maintains offices in Chicago and Denver. Gates Depo. at 6, 34, 50. The district court stated erroneously in its order that *Rocmount* maintains those offices. Also, the Petition's first sentence contains an intentional misstatement. Rocmount is identified as "of Denver, Colorado," which it most certainly is not.

[2] "App." references are to Petitioner's Appendix.

Rocmount had met its burden of proving diversity and had established that its principal place of business is in either Utah or Wyoming, the two states encompassing Rocmount's only asset, the interest in the AREU,[3] or at Production's principal place of business in Illinois. App. at 46a.

The Tenth Circuit carefully analyzed the state of the law in the other circuits and noted that the "nerve center" and "corporate activities" tests are really "two sides of the same coin," and that the preferred practice is to utilize a flexible approach, able to consider the full panoply of factors embodying both tests, and analyzing the "totality of the circumstances." App. at 8a. Such an approach also allows differing analyses depending on the type of corporation involved. Thus, the "total activity" test *encompasses* the "nerve center" test, and calls for its use in appropriate circumstances. App. at 8a n.2. Applying this "total activity" test, the Tenth Circuit had "little difficulty" agreeing with the district court that whether Rocmount's principal place of business is in Wyoming or Utah, it cannot be in Colorado. App. at 10a.

No issue raised in the Petition is worthy of review by this Court because (1) Rocmount met its burden of proving diversity of citizenship, and was not required to establish in which diverse state its principal place of business is located, (2) the circuits are not in conflict over

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[3] The Petitioner makes the misstatement that "there is no indication that Rocmount's passive reserves are either predominantly in Wyoming or predominantly in Utah." Petition at 22 n.7. In fact, the district court found, based on undisputed evidence, that the AREU's reserves are located predominantly in Utah. App. at 31a.

the appropriate method of determining a corporation's principal place of business, particularly where, as here, the corporate structure is a simple one, and (3) this case is a poor vehicle for this Court to create new law restricting the district courts' flexibility in making principal place of business determinations.

REASONS FOR DENYING THE WRIT

1. Rocmount Satisfied Its Burden Of Proving Diversity Of Citizenship.

Anschutz contends that the courts below were required to identify the specific location of Rocmount's principal place of business, even though Rocmount established that each of the three possible locations affords complete diversity.

As both the district court and the Tenth Circuit held, it is not necessary to identify the exact location of a corporation's principal place of business if that corporation establishes, and the district court finds, that diverse citizenship exists.

> Finally, a party need not always prove the exact location of a corporation's principal place of business; all that is necessary is that he establish that diverse citizenship does or does not exist. If it can be shown, for example, that the principal place of business is one of two states, and the opposing party is not a citizen of either of them, jurisdiction will be upheld.

13B Charles A. Wright *et al.*, *Federal Practice & Procedure* § 3625 at 642 (2d ed. 1984).

Contrary to Anschutz's assertion, Petition at 21, both lower courts recognized that Rocmount bore the burden of establishing its diverse citizenship, and held that Rocmount had satisfied that burden. App. at 7a, 10a; App. at 45a, 48a. Rocmount's burden was to demonstrate the facts upon which diversity jurisdiction could exist. *University of Rhode Island v. A.W. Chesterton Co.*, 2 F.3d 1200, 1213 (1st Cir. 1993). Upon such a *prima facie* showing, Anschutz carried the burden of rebutting the showing. *Id.*

Rocmount established, and the district court found, that its principal place of business is in Wyoming or Utah, where its only asset is located. App. at 46a. A "nerve center" analysis would find Illinois to be Rocmount's principal place of business, while a "center of activity" or "total activity" test would find Wyoming or Utah to be the principal place of business. Under no test would Colorado be deemed to be Rocmount's principal place of business.[4] *Id.*

Anschutz argues that a district court must, in all diversity cases, determine the precise location of a corporation's principal place of business, and cannot make

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[4] Anschutz makes the unremarkable observation that since different tests could result in different conclusions, a rigid single-factor test should be imposed. Petition at 16. First, in this case, *any* test results in diversity. Second, Anschutz's observation merely underscores the importance of having flexibility to apply the factors most appropriate to the specific corporation at issue.

alternative findings of fact.[5] First, Anschutz cites no authority for placing this burden on courts and litigants, even where no genuine issue concerning diversity exists. For example, in the present case, Anschutz would require further analysis from the district court to select a principal place of business from among several states, each of which is diverse from Anschutz's citizenship. No good reason is advanced for adding this burden where nothing is gained from the time, money and effort expended. Federal court jurisdiction is present in any event, so further discovery, evidence and analysis is wasteful. Since the federal courts are courts of limited jurisdiction, and since a party seeking to invoke that jurisdiction always bears the burden of proving the presence of such jurisdiction, Anschutz would presumably require findings of fact and conclusions of law establishing each party's principal place of business in every diversity case, even when diversity jurisdiction is not disputed. There is no valid basis for imposing such a wasteful burden on courts and litigants.[6]

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[5] Anschutz confuses the issue of whether a district court must precisely locate a corporation's principal place of business with the issue of whether a corporation can have multiple principal places of business. Petition at 21-23. Rocmount does not contend that at any one point in time a corporation can have more than one principal place of business; it only contends that if each of the possible locations would preserve diversity, no finding of the precise location of the principal place of business is required.

[6] This important practical consideration contrasts sharply with Anschutz's curious suggestion that for practical reasons a district court must identify a corporation's principal place of business to preclude large corporations from presenting a

Second, district courts routinely end the inquiry into diversity at the point where further analysis would yield no possible different result. *See, e.g., Casio, Inc. v. S.M. & R. Co., Inc.*, 755 F.2d 528, 530 (7th Cir. 1985); *Quaker State Dyeing & Finish Co. v. ITT Terryphone Corp.*, 461 F.2d 1140, 1143 (3rd Cir. 1972); *Celanese Corp. of Am. v. Vandalia Warehouse Corp.*, 424 F.2d 1176, 1178 (7th Cir. 1970); *Roman Ramos v. H.B. Fuller Co.*, 729 F. Supp. 221, 223 (D. P.R. 1990); *R.W. Int'l, Inc. v. Borden Interamerica, Inc.*, 673 F. Supp. 654, 658 (D. P.R. 1987); *Jerro v. Home Lines, Inc.*, 377 F. Supp. 670, 672 (S.D.N.Y. 1974); *Nassau Sports v. Peters*, 352 F. Supp. 867, 868 (E.D.N.Y. 1972); *Leve v. General Motors Corp.*, 246 F. Supp. 761, 764 (S.D.N.Y. 1965); *Textron Elecs., Inc. v. Unholtz-Dickie Corp.*, 193 F. Supp. 456, 460 (D. Conn. 1961).

Third, even if failure to identify the precise location of Rocmount's principal place of business was error, it was harmless error in this case, since each possible location would maintain diversity of citizenship.[7] 28 U.S.C. § 2111. *See McDonough Power Equip., Inc. v. Greenwood*, 464

"moving target." Petition at 21-23. This argument ignores the fact that so long as every reasonable candidate for selection as that corporation's principal place of business preserves diversity, selection of one is a useless and wasteful exercise. Rocmount never wavered from its initial position that its principal place of business was either at the AREU or in Illinois. No rule prohibits such alternative theories, particularly where each alternative maintains diversity.

[7] Since such "error" did not make the difference between a finding of diversity and one of a lack of diversity, it is not "a failure to clear a jurisdictional hurdle", which can never be harmless error. *Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 318 n.3 (1988).

U.S. 548, 553-54 (1984); *Securities and Exch. Comm'n v. Chenery Corp.*, 318 U.S. 80, 88 (1943).

In short, the lower courts acknowledged Rocmount's burden of proving complete diversity, and correctly held that such burden was satisfied, based on the undisputed factual findings made by the district court.

2. Rocmount's Citizenship Was Correctly Held To Be Diverse From Anschutz's.

Anschutz contends that the lower courts erred in failing to apply the "nerve center" test in determining Rocmount's principal place of business, and asks this Court to impose the "nerve center" test in all circumstances where diversity of citizenship is at issue. It is well established, and both the district court and the Tenth Circuit held, that "nerve center" analysis is merely one component of principal place of business analysis, and is applicable only in situations where the corporation's operations are far-flung and varied. App. at 8a n.2; App. at 45a-46a. *See J.A. Olson Co. v. City of Winona*, 818 F.2d 401 (5th Cir. 1987); *United Nuclear Corp. v. Moki Oil & Rare Metals Co.*, 364 F.2d 568 (10th Cir. 1966), *cert. denied*, 385 U.S. 960 (1966); *Scot Typewriter Co. v. Underwood Corp.*, 170 F. Supp. 862 (S.D.N.Y. 1959). Even the Bankruptcy Act hearing testimony and the cases relied upon in the Petition only apply "nerve center" analysis to corporations with "widespread" activities. Petition at 10, 12.

Here, the district court's unchallenged factual findings (which cannot be set aside unless clearly erroneous, *Media Duplication Servs. v. HDG Software*, 928 F.2d 1228 (1st Cir. 1991)), and the legal basis for not employing the

"nerve center" test, were that Rocmount's corporate structure is simple. All Rocmount's assets are in a single location (the AREU) and the corporate system is not geographically widespread. App. at 45a-46a. The district court held that:

> The citizenship of [Rocmount] is not nearly so complex an issue as was the citizenship of United Nuclear. We see no need to apply the "nerve center" test here, where the complex and geographically widespread corporate system that existed in *Moki* is not present. The "center of activity" test developed by the Third Circuit in *Kelly v. United States Steel Corp.*, 284 F.2d 850 (3rd Cir. 1960), and adopted in this circuit in *Fellers v. Atchison, Topeka & Santa Fe Ry. Co.*, 330 F. Supp. 1334 (D. Kan. 1971), is more appropriate to the circumstances of this case. The "center of activity" test determines a corporation's principal place of business by looking at the state "where the bulk of the assets and where management of day-to-day affairs are located. . . ." *Id.* at 1338. The two tests are reconcilable, and the choice between the two depends on the character of the corporation. Where, as here, all of the company's assets are in a single location, the "center of activity" test more logically applies.

App. at 45a-46a (citations and footnote omitted).

The Tenth Circuit agreed that under Rocmount's circumstances, the "total activity" test would not focus exclusively on "nerve center" analysis, but more properly would look to the location of Rocmount's assets and production activities, *all* of which occur at the AREU, not in Colorado. App. at 7a-9a.

Rocmount's principal place of business under a "nerve center" analysis would be Illinois, where the undisputed evidence established that its corporate decisions are made. Tr. Vol. II at 33; Tr. Vol. VI at 66. Under any other test, Rocmount's principal place of business is at the AREU, which straddles Utah and Wyoming (the bulk of assets occurring in Utah, App. at 31a). Anschutz simply ignores what was obvious to both the district court and the Tenth Circuit – that Rocmount (as opposed to Production) has no contact whatsoever with Colorado excepting only its Management Agreement with Production. The district court held:

> Plaintiff in this suit is neither Amoco Corporation nor Amoco Production; it is Amoco Rocmount, whose sole function is to manage the AREU, located in Wyoming and Utah. Its corporate structure is simple, and its presence is geographically limited. Since [Rocmount's] assets and production activities are located entirely in Wyoming and Utah, its principal place of business is also in Wyoming or Utah. We need not determine in which of these two states [Rocmount's] principal place of business is; it is sufficient that we have decided it is not in Colorado.

App. at 46a. The Tenth Circuit concurred, stating concisely that:

> We have little difficulty upholding the district court's conclusion under the total activity test. The only connection between [Rocmount] and Colorado is the management contract with Amoco Production. [Rocmount] has no employees in Colorado. [Rocmount's] sole function is to operate the AREU as unit operator and

> to manage Amoco Production's interest in the unit. Therefore, the locus of [Rocmount's] total activities is the AREU which spans two states, Wyoming and Utah. Anschutz is a Kansas corporation with its principal place of business in Colorado. There is complete diversity between the parties, and jurisdiction was proper in the district court.

App. at 10a.

There can be no dispute that under a "total activity" analysis complete diversity existed, and federal court jurisdiction was present. The following is a list of undisputed facts on which the district court based its findings. These facts[8] establish that Rocmount's principal place of business is either Illinois, Utah or Wyoming, but in no event Colorado:

- Rocmount has no employees in Colorado. Gates Depo. at 24; App. at 10a.

- Rocmount has no offices in Colorado, Gates Depo. at 34; its executive offices are located in Illinois. Gates Depo. at 6, 50.

- Rocmount owns no property, real or personal, in Colorado; its only asset is located in Wyoming and Utah. Gates Depo. at 31; Tr. Vol. II at 66.

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[8] Many of the factual assertions made in Petitioner's Statement of the Case are either irrelevant or misleading. For example, the representation that thirteen of Rocmount's officers resided in Colorado was never true at any given point in time. In fact, at all times the majority of both Rocmount's officers and its directors resided in Illinois. Gates Depo. at Exhibits 5-7.

- Corporate decisions are made in Illinois. Tr. Vol. II at 33; Tr. Vol. VI at 66.

- Rocmount's corporate records are maintained in Illinois. Gates Depo. at 27.

- The majority of Rocmount's officers and directors were located in Illinois at all relevant times. Gates Depo. at 6, 24; Tr. Vol. II at 33; Gates Depo. at Exhibit 1.

- Rocmount files its federal income tax return in Illinois[9]; the returns are prepared and signed by individuals working in Illinois. Gates Depo. at 13, 14, 21.

- Rocmount's annual corporation report to the State of Wyoming, its franchise or income tax return for the State of Utah and its annual franchise tax report filed in Delaware, all list Rocmount's principal place of business as Chicago. Gates Depo. at Exhibit 1.

- Rocmount maintains only one bank account, in New York City. Gates Depo. at 33.

The determination of a corporation's principal place of business ultimately is a factual one. *J.A. Olson Co. v. City of Winona*, 818 F.2d 401, 406 (5th Cir. 1987); 1 James W. Moore *et al.*, *Moore's Federal Practice* ¶ 0.77[3.-1] at 717.62, 717.64 (2d ed. 1993). Indeed, this Court recently explained (in the context of the Internal Revenue Code)

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[9] This is a particularly significant fact since a corporation is required to file its federal tax return in the Internal Revenue District in which its principal place of business is located. 26 U.S.C. § 6091(b)(2)(A)(i).

that a principal place of business determination is inherently factual, and not appropriate for a single, objective test:

> In determining whether the proper test for deciding whether a home office is the principal place of business, we cannot develop an objective formula that yields a clear answer. The inquiry is more subtle, with the ultimate determination of the principal place of business being dependent upon the particular facts of each case.

Commissioner of Internal Revenue v. Soliman, 113 S.Ct. 701, 706 (1993). This Court cannot possibly find that the factual findings made by the district court and affirmed by the Tenth Circuit were clearly erroneous.

The Petition reflects Anschutz's confusion between Rocmount and Production. In fact, the Petition states that a "nerve center" analysis of Rocmount would properly focus on ascertaining *Production's* principal place of business. Petition at 21. The district court found, and there is no dispute, that if Production's citizenship or business were at issue, Illinois is its principal place of business, even under the "nerve center" test. App. at 46a n.2. Recognizing that Anschutz was ignoring the management contract between Rocmount and Production, and was imputing business activity to Rocmount from operations conducted by Production in its Denver regional office, the district court observed that:

> Defendant does not argue that Amoco Rocmount is in fact the alter ego of Amoco Production; if it did, there would still be diversity

> because the "nerve center" of Amoco Production is indisputably in Illinois. The "nerve center" test would be appropriate if the Court were attempting to determine the principal place of business of Amoco Production, which has a complex corporate structure and various geographically distinct offices.

App. at 46a n.2.

It is well established that in determining Rocmount's principal place of business, courts may look only to Rocmounts' business activities, not to Production's. *Taber Partners I v. Merit Builders, Inc.*, 987 F.2d 57, 61 (1st Cir. 1993), *cert. denied*, 114 S. Ct. 82 (1993); *Danjaq, S.A. v. Pathe Communications Corp.*, 979 F.2d 772, 775 (9th Cir. 1992); *Topp v. Compair, Inc.*, 814 F.2d 830, 834-35 (1st Cir. 1987); *Armstrong v. Goldblatt Tool Co.*, 609 F. Supp. 736, 738 (D. Kan. 1985); 1 James W. Moore *et al.*, *Moore's Federal Practice* ¶ 0.77[1.-2] (2d ed. 1993).

3. There Is No Conflict Among The Circuits.[10]

This Court has never felt the need to make a pronouncement as to the method for determining a corporation's principal place of business; yet, the circuits evolved

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[10] The Petition makes the misstatement that the Tenth Circuit expressly acknowledged a split among the circuits. Petition at 5, 6. To the contrary, the Tenth Circuit carefully analyzed the court opinions and scholarly writings, acknowledging that different nomenclature is sometimes used, and recognized that the tests are reconcilable. The Tenth Circuit cited with approval the conclusion reached by Wright *et al.*, that the different tests are simply applications of the general rule that the choice of a principal place of business is governed by the "bulk of corporate activity." App. at 8a.

naturally to a flexible approach encompassing all relevant factors, and selecting a corporation's principal place of business based on the totality of the circumstances. The circuits no longer adhere blindly to a rigid test without regard to the nature of the subject corporation. Only the Seventh Circuit still claims to adhere to one standard in all cases, the "nerve center" test, and even that Circuit's decisions belie that posture.

The complexity of the modern business world, and the "myriad incarnations of corporate form and operations," require affording flexibility to the district courts in analyzing a corporation's principal place of business. App. at 9a. Thus, every circuit, in recognition that determining a corporation's principal place of business involves a fact and circumstance analysis, uses some form of flexible test capable of considering the totality of the circumstances relevant to that determination. However the various circuits denote such a test, each circuit maintains the flexibility to apply differing analyses, depending on the structure of the subject corporation, and seeks on a case-by-case basis to identify a corporation's principal place of business by considering *all* its activities.

The following cases signify by circuit the universal use, whether explicit or implicit, of a test designed to locate the bulk of a corporation's activities. *Taber Partners I v. Merit Builders, Inc.*, 987 F.2d 57, 61 (1st Cir. 1993); *R.G. Barry v. Mushroom Makers, Inc.*, 612 F.2d 651, 655 (2d Cir. 1979); *Egan v. American Airlines, Inc.*, 324 F.2d 565, 566 (2d Cir. 1963); *Kelly v. United States Steel Corp.*, 284 F.2d 850, 854 (3rd Cir. 1960); *Mullins v. Beatrice Pocahontas Co.*, 374 F. Supp. 282, 285-86 (W.D. Va., 1974), *aff'd without opinion*, 530 F.2d 969 (4th Cir. 1975); *Harris v. Black Clawson Co.*,

961 F.2d 547, 549 (5th Cir. 1992); *Grinter v. Petroleum Operation Support Serv., Inc.*, 846 F.2d 1006, 1008 (5th Cir. 1988), *cert. denied*, 488 U.S. 969 (1988); *J.A. Olson*, 818 F.2d at 409-10; *Gafford v. General Elec. Co.*, 997 F.2d 150, 163 (6th Cir. 1993); *Kanzelberger v. Kanzelberger*, 782 F.2d 774, 777-78 (7th Cir. 1986); *Mahoney v. Northwestern Bell Tel. Co.*, 258 F. Supp. 500, 502 (D. Neb. 1966), *aff'd*, 377 F.2d 549 (8th Cir. 1967); *Industrial Tectonics, Inc. v. Aero Alloy*, 912 F.2d 1090, 1092-94 (9th Cir. 1990); *United Nuclear*, 364 F.2d at 570; *Vareka Invs., N.V. v. American Inv. Properties, Inc.*, 724 F.2d 907, 909-10 (11th Cir. 1984), *cert. denied*, 469 U.S. 826 (1984).

Through an evolutionary process commencing in 1959 with *Scot Typewriter*, the circuits have crafted different "tests" to apply to principal place of business analysis, depending upon the corporate structure involved. Thus, all circuits agree that where a corporation "is engaged in far-flung and varied activities which are carried on in different states, its principal place of business is the nerve center from which it radiates out to its constituent parts and from which its officers direct, control and coordinate all activities." *Scot Typewriter*, 170 F. Supp. at 865. The courts further agree that where significant administrative authority and activity occurs in one state, and lesser executive officers but principal operations occur in another, the former state is that corporation's principal place of business. *Kelly*, 284 F.2d at 854. It is also accepted now that where a corporation's headquarters are located in one state, and the corporation carries on only one activity, located in another state, it is the latter state in which the corporation's principal place of business is located. *Lurie Co. v. Loew's San Francisco*

Hotel Corp., 315 F. Supp. 405 (N.D. Cal. 1970); *Inland Rubber Corp. v. Triple A Tire Serv., Inc.*, 220 F. Supp. 490 (S.D.N.Y. 1963).

J.A. Olson provides a thorough explication of the manner in which these tests "simply stand for general rules regarding the determination of a particular corporation's principal place of business." *J.A. Olson*, 818 F.2d at 409. Courts and commentators alike recognize that the varying approaches "are therefore not mutually exclusive but rather complementary." *Id.* at 410; 13B Charles A. Wright *et al.*, *Federal Practice & Procedure* § 3625 at 634-35 (2d ed. 1984).

Lurie is a good example of the proper analysis to apply to a corporation such as Rocmount. The defendant was incorporated in Delaware and organized by the officers of its parent corporation, located in New York, for the purpose of leasing and operating a hotel in San Francisco. The hotel was the defendant's only operating asset, just like the AREU interest is Rocmount's only asset. However, the corporation's officers, who formulated the company's overall operating policies, were located in New York. Thus, this single-purpose corporation had its nerve center in New York, but the entirety of its assets and business operations were in California. *Lurie*, 315 F. Supp. at 407-08. The defendant in that case was, therefore, virtually identically situated to Rocmount, which was formed and is governed in Illinois, but which maintains its only asset and operations at the AREU, in Wyoming and Utah.

The court in *Lurie* rejected strict application of the "nerve center" test, because "nerve center" analysis is

only properly applied to a corporation engaging in far-flung and varied activities that are carried on in different states. *Id.* at 416. Instead, that court balanced the totality of the relevant factors, and determined California to be the defendant's principal place of business. In so doing, the court noted that the various tests were merely "articulations of the same concept." *Id.* at 415.

In short, the various tests are nothing more than:

> [P]articular applications of the general rule that the bulk of corporate activity, as evidenced by the location of daily operating and management activities, governs the choice of a principal place of business.

13B Charles A. Wright *et al., Federal Practice & Procedure* § 3625 at 625 (2d ed. 1984).

Only the Seventh Circuit even pays lip service to a strict adherence to a "nerve center" test. A review of recent Seventh Circuit opinions, however, reveals that even that Circuit examines all of the activities of a corporation in determining its principal place of business.

Illustrative of the Seventh Circuit's true methodology is *Kanzelberger*, a case relied upon by Anschutz in arguing that the Seventh Circuit strictly applies the "nerve center" test. In *Kanzelberger*, the subject corporation was run "in rather a dictatorial fashion" by an Illinois citizen in the corporation's Illinois office, but the corporation's single plant and all employees and other officers were located in Wisconsin. *Kanzelberger*, 782 F.2d at 777. Had the Seventh Circuit rigidly applied the "nerve center" test, the clear outcome would have been a finding that

the corporation's principal place of business was in Illinois. Instead, the Seventh Circuit examined all relevant activities of the corporation in determining the location of its principal place of business, including the location of the corporation's plant, employees and officers. *Id.*

After considering all the activities of the corporation, the Seventh Circuit determined that its principal place of business was in Wisconsin, not in the state in which the corporation's "brain" resided. *Id.* at 778. As the Fifth Circuit noted in analyzing the *Kanzelberger* opinion:

> Notwithstanding the fact that the Seventh Circuit tips its hat to the "nerve center" test, *Kanzelberger* illustrates that, when applied by that court, "nerve center" is only another term for "principal place of business," which is determined after examining all of the facts in a given case.

J.A. Olson, 818 F.2d at 408.

Another case arising within the Seventh Circuit, after *Kanzelberger*, further illustrates the point. In *Fathers of the Order v. National Ben Franklin Ins. Co.*, 697 F. Supp. 971 (N.D. Ill. 1988), the plaintiff was a California corporation with its facility located in Illinois. The Illinois facility rendered high level policy decisions, while the California operations maintained the assets, earned the income, and made the expenditures. Expressly relying on *Kanzelberger*, that court determined California to be the principal place of business, noting that *Kanzelberger* embodies the Seventh Circuit's edict that:

> The "nerve center" of the corporation is its principal place of business, as evidenced by the

> presence of a corporate facility, officers and employees, and maintenance of corporate records.

Id. at 972 (citing *Kanzelberger*, 782 F.2d at 777). Thus, the Seventh Circuit denotes its test as a "nerve center" test, but in identifying a corporation's "nerve center", even the Seventh Circuit employs a totality of the circumstances analysis. *J.A. Olson*, 818 F.2d at 408.

Only Anschutz seems unable to recognize that this flexible totality of the circumstances approach, despite its various labels, is applied universally with little dissent or confusion, and is capable of accommodating the corporate complexities emanating from today's business environment.

4. This Case Represents A Poor Vehicle For Creating New Law Restricting The District Courts' Flexibility In Making Principal Place Of Business Determinations.

Even if this Court were otherwise inclined to establish new law creating a single, inflexible test, it should not use this case as the opportunity to do so for at least three reasons. First, this Court has previously denied certiorari in numerous prior cases involving principal place of business determinations, including some of the cases relied upon in Anschutz's Petition. *Taber Partners I v. Merit Builders, Inc.*, 987 F.2d 57 (1st Cir. 1993), *cert. denied*, 114 S. Ct. 82 (1993); *U.S.I. Properties Corp. v. M.D. Constr. Co.*, 860 F.2d 1 (1st Cir. 1988), *cert. denied*, 490 U.S. 1065 (1989); *Grinter v. Petroleum Operation Support Serv., Inc.*, 846 F.2d 1006 (5th Cir. 1988), *cert. denied*, 488 U.S. 969

(1988); *Vareka Invs., N.V. v. American Inv. Properties, Inc.*, 724 F.2d 907 (11th Cir. 1984), *cert. denied*, 469 U.S. 826 (1984); *Bialac v. Harsh Bldg. Co.*, 463 F.2d 1185 (9th Cir. 1972), *cert. denied*, 409 U.S. 1060 (1972); *United Nuclear Corp. v. Moki Oil & Rare Metals Co.*, 364 F.2d 568 (10th Cir. 1966), *cert. denied*, 385 U.S. 960 (1966). Nothing has transpired in the meantime to warrant Supreme Court review. To the contrary, the circuits have clearly evolved to a flexible approach encompassing consideration of the totality of the circumstances, and away from rigid adherence to a single-issue test.

Second, since only the Seventh Circuit even pays lip service to a single-issue test, a case decided in that Circuit, involving strict application of the "nerve center" test, and where use of a "total activity" analysis would yield a different result and would actually reverse a finding of federal court jurisdiction, would be a far better vehicle for a Supreme Court pronouncement.

Third, and most important, no matter what test would be embraced by this Court, jurisdiction exists in this case, and there would be no effect on the outcome of this litigation. Under the undisputed facts, a "nerve center" approach is inapplicable to Rocmount because of the simplicity of its corporate structure. Further, a "nerve center" analysis, applied to Rocmount (or to Production), results in the determination that Illinois is Rocmount's principal place of business, not Colorado. App. at 46a. If this Court embraces a totality of the circumstances test of any type, Rocmount's principal place of business has been found to be in Utah or Wyoming. App. at 10a, 46a. In any event, reversal, remand or affirmance on the merits by this Court would not change the conclusion

that Rocmount's and Anschutz's citizenships are diverse, and would accomplish nothing other than to delay further Respondents' recovery.

CONCLUSION

For the reasons stated herein, the Petition for a Writ of Certiorari should be denied.

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No. 93-903

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

THE ANSCHUTZ CORPORATION,
Petitioner,
v.
AMOCO ROCMOUNT COMPANY and
UNION PACIFIC RESOURCES COMPANY,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

REPLY BRIEF FOR PETITIONER

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TABLE OF AUTHORITIES

CASES

	Page
Casio, Inc. v. *S.M. & R. Co., Inc.*, 755 F.2d 528 (7th Cir. 1985)	5
J.A. Olson Co. v. *City of Winona*, 818 F.2d 401 (5th Cir. 1987)	3
Kelly v. *United States Steel Corp.*, 284 F.2d 850 (3d Cir. 1960)	3
Lurie Co. v. *Loew's San Francisco Hotel Corp.*, 315 F. Supp. 405 (N.D. Cal. 1970)	1
Quaker State Dyeing & Finishing Co. v. *ITT Terryphone Corp.*, 461 F.2d 1140 (3d Cir. 1972)	5
Wisconsin Knife Works v. *National Metal Crafters*, 781 F.2d 1280 (7th Cir. 1986)	1

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-903

THE ANSCHUTZ CORPORATION,
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REPLY BRIEF FOR PETITIONER[1]

The Brief in Opposition demonstrates that there is at the very least a split between the Seventh Circuit and the other Circuits on the proper test to be used to determine the principal place of business in every diversity case involving a corporation (*see* Opp. at 5, 13, 15, 18).[2] The

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[1] Petitioner's Rule 29.1 statement appears at Pet. at ii.

[2] The place to look for the Seventh Circuit's view of the "nerve center" test is not in the Fifth Circuit, or in the district courts of California and New York (*see* Opp. at 16-18), but in the Seventh Circuit itself, from such cases as *Wisconsin Knife Works* v. *National Metal Crafters*, 781 F.2d 1280 (7th Cir. 1986). Moreover, Rocmount is not analogous to the defendant in *Lurie Co.* v. *Loew's San Francisco Hotel Corp.*, 315 F. Supp. 405 (N.D. Cal. 1970), whose "nerve center" was in New York and primary asset in California. Rocmount's assets were in two states, and even under the

split, however, is much more serious and diverse than this. The decisions cited in the Petition confirm that the differing approaches are not simply a matter of "nomenclature," as Respondents suggest (*id.* at 14 n.10), but rather ones that produce different results.

Respondents demonstrate this themselves. They claim that application of the "nerve center" test would place Rocmount's locus not in Utah or Wyoming, where the "center of corporate activity" test placed it, but in Illinois (*id.* at 5, 7 n.6, 10, 11 including n.8 (three times), 12 (six times), 13, 17, 21). Of course, that assertion alone demonstrates the confusion in this area of the law, because if it were true, a corporation's principal place of business could be in a state in which it is not even licensed to do business. Respondents do not, and could not, dispute that Rocmount was never licensed to operate in Illinois, and yet they fail even to mention this highly significant fact. The Court of Appeals certainly recognized its significance, which is why it did *not* find Rocmount's locus in Illinois but instead located it in either Utah or Wyoming.

But just as importantly, Respondents' argument about Illinois shows that different results ensue when different tests are applied. If it were true that Illinois was the principal place of business under the "nerve center" test and another state under another test, that totally belies Respondents' contention that the differences among the Circuits are no more than a matter of semantics.

The fact is that the "nerve center" test squarely places Rocmount in Colorado for all the reasons spelled out in the Petition.[3]

"total activity" test, a court must look to the "nerve center" when the assets are not all in one jurisdiction.

[3] Respondents refer to Petitioner's "confusion" between Rocmount and Production (Opp. at 13). Petitioner was not confused. As demonstrated in the Petition, the relationship between the two was

The cases that Respondents rely on for the proposition that there is no real split in the Circuits because their differences are more a matter of "nomenclature" than substance belie the argument. For example, Respondents argue that the tests in the Third Circuit, represented by *Kelly* v. *United States Steel Corp.*, 284 F.2d 850 (3d Cir. 1960), and the Fifth Circuit, represented by *J.A. Olson Co.* v. *City of Winona*, 818 F.2d 401 (5th Cir. 1987), are indistinguishable (Opp. at 15-16). But the tests applied in these Circuits will lead to different results in numerous cases. *Kelly* focuses the inquiry on a determination of the "headquarters of day-to-day corporate activity and management," with much less importance given to factors like the location of personnel and plants. 284 F.2d at 854. Thus, a corporation with a plant in one state and management headquarters in another state would have its principal place of business in the latter. *J.A. Olson*, however, establishes that "when a corporation has its sole operation in one state and executive offices in another, the place of activity is regarded as more significant." 818 F.2d at 411. The same corporation described above would have its principal place of business in the state with the plant under *J.A. Olson*. The split among the Circuits is clear.

Respondents' response to virtually every argument in the Petition is that the federal courts must have "flexibility" in approaching the principal place of business issue (*see* Opp. at 3, 4, 5 n.4, 15 (four times), 20 (three times), 21). Respondents in no way explain how this flexibility can be reconciled with Congress's direction that the federal courts determine in each diversity case involving a corporation "the" principal place of business in which that corporation is located. In fact, one searches

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established in two documents which they both signed—and which specifically provided that the law governing the relationship would be that of the State of Colorado. Respondents refer to only one of these documents, in their Statement of the Case, but never discuss the significance of either of them.

the Brief in Opposition in vain for *any* discussion of the statutory language or its history. It is precisely because of the "flexibility" that has evolved among the Circuits that a total disparity in approaches toward this issue has arisen—a disparity which, as Respondents concede (Opp. at 14), this Court has never directly addressed.

While contending that these various disparities can somehow be reconciled, Respondents at the same time concede that "the circuits have crafted different 'tests' to apply to principal place of business analysis, depending upon the corporate structure involved" (*id.* at 16).[4] Indeed they have. And if the controlling statute should be interpreted to allow such disparities, this Court should say so, because nothing in the plain language of the statute or in its legislative history warrants such a conclusion, as demonstrated by the Petition. In fact, nothing in the statute indicates that different tests apply to different corporations, or that if a corporation has a structure that is "simple" or "uncomplicated" (*see id.* at i, 4, 21), as opposed to one with activities that are "widespread" or "far-flung and varied" (*see id.* at 8, 16, 18), one set of criteria rather than another applies, or that in any event the underlying issue should be determined on "a case-by-case basis" (*id.* at 15). There may be policy reasons for such a "flexible" approach to the principal place of business question, but that is for Congress to decide. Congress certainly has *not* adopted such an approach to date.

The Petition fully addresses the point that the statute requires a court to locate "the" principal place of business of a corporation in a diversity case. Respondents flatly contest that proposition (*see* Opp. at i, 4-8), and some of the cases they cite have adopted their view.[5] That issue

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[4] *See also* Opp. at 17, where Respondents refer to "the varying approaches" taken by the courts on this issue.

[5] Review of a few of the cases cited by Respondents in support of their proposition that "district courts routinely end the inquiry into diversity at the point where further analysis would yield no

alone deserves review by this Court, because such a conclusion is directly contrary to Congress's plain language. Moreover, the failure of the courts below to identify a single principal place of business makes clear the difficulty of applying the test they adopt. Suppose, for example, that Petitioner in all respects was located in Wyoming instead of Colorado. Would the trial court still claim it was unable to decide between Wyoming and Utah as Rocmount's locus? If not, what new test would it have to devise to accommodate the facts? And if it *could* decide between the two states, what explanation is there for why it has not done so here; in other words, what facts that are not already apparent would allow it to resolve the issue?

Respondents counter by arguing that courts can make "alternative findings of fact" (Opp. at 5-6). This is specious. A party, of course, can advance alternative theories to support its position, but a court's job is to make decisions—particularly when ordered to do so by Congress. It is impossible to reconcile the "alternative findings" argument with the statutory directive to find "the" principal place of business.

* * * *

The one test that not only conforms to the statute and its history but makes the most sense is the "nerve center" test. It works all the time, and it is simple to apply. The "total activity" test is confusing; when the facts complicate its application, it reverts to the "nerve center" equation.

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possible different result" (Opp. at 7), shows that the proposition is dubious. For example, the Seventh Circuit in *Casio, Inc.* v. *S.M. & R. Co., Inc.*, 755 F.2d 528, 530 (7th Cir. 1985), affirmed the district court's finding of diversity as not clearly erroneous, but suggested that the better course would have been to hold an evidentiary hearing on the principal place of business question. More striking is *Quaker State Dyeing & Finishing Co.* v. *ITT Terryphone Corp.*, 461 F.2d 1140, 1143 (3d Cir. 1972), where the court noted that "Terryphone's distinct principal place of business is to be determined."

In any event, two points are clear. First, the Tenth Circuit was patently wrong. For all of the reasons set forth in the Petition, Rocmount's "nerve center" is in Colorado, and because the AREU spans two states, its "nerve center" is its principal place of business. Second, all of this confusion—regardless of which test emerges—requires the attention of this Court. The relatively simple and direct language used by Congress has spawned a wide variety of interpretations and applications that can only be resolved here. The issue is a constantly recurring one; it will not go away on its own.

Respectfully submitted,

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